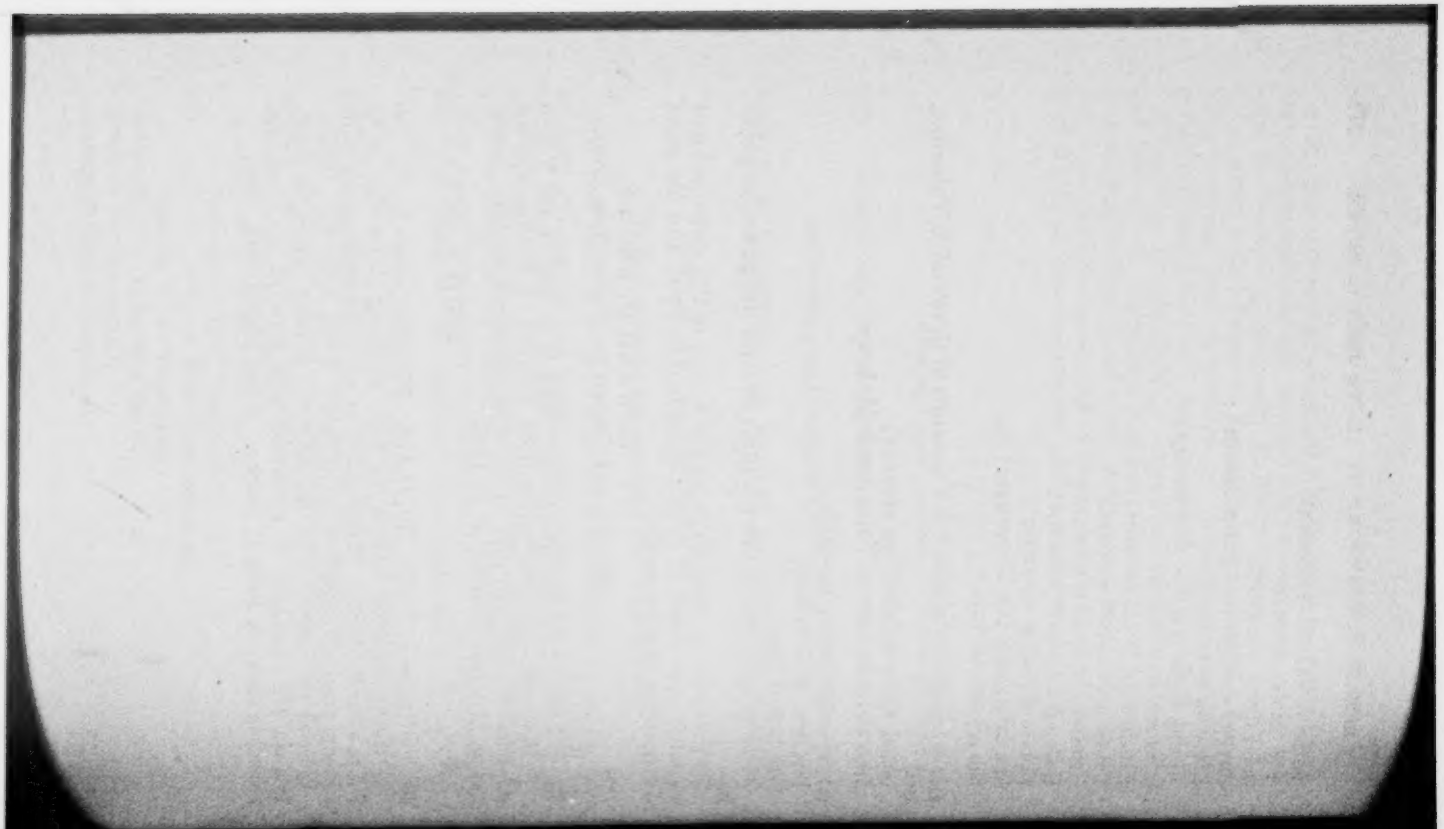

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IN THE

Supreme Court of the United States

October Term, A. D. 1902.

No. 312

RICHARD C. CRAWFORD and EDWARD A. VALENTINE,
Plaintiffs in Error,

vs.

JOHN R. BURKE,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

CHARLES F. VROOMAN
GEORGE PACKARD
HARRISON MUSGRAVE
Attorneys for Plaintiffs in Error.

(See Printed on Reverse Page)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 247

RICHARD C. CRAWFORD and EDWARD A. VALENTINE,
Plaintiffs in Error,
vs.
JOHN E. BURKE,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

The jurisdictional ground upon which this case comes before this court on error to the Supreme Court of the State of Illinois is the Federal question involved in the interpretation of Sections 17 and 63 of the Bankruptcy Act of 1898. Whether, in fact, the claim upon which judgment was rendered against plaintiffs in error was a "provable debt," which their plea of discharge in bankruptcy bars, is the question at issue; it is a mooted question of far-reaching moment, that has never before reached this tribunal, and

demands careful attention apart from its determining force and application in the case at bar.

We are well aware that this court on a writ of error to a state court has usually held that questions of fact upon which the state courts have passed, are not open for review here. That is unquestionably the ordinary rule, and will dispense with a discussion of the law as applied to such facts in many phases that were bitterly contested through the various courts below, to the conclusions of which courts thereon we must respectfully bow. But, as will be seen, we must, in the nature of the Federal question involved, re-examine most, if not all, of the evidence, in this record. The point of law involves in its very nature this review. Was there not error in holding as naught the discharge in bankruptcy pleaded below, in view of the pleadings and the facts disclosed by the record? That is the question, which clearly involves the application of what was said by this court in *Dower* v. *Richards,* 151 U. S., 658.

> "Where, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court."

But there is another, and peculiar reason, why, in the interests of justice this court should consider the facts of this particular case. And that is, that the facts have *never* been actually passed upon fully by any court, and not at all by any of the courts of review. The case was tried in the first instance, by the court, without the intervention of a jury. At the conclusion of the plaintiff's case, Mr. Crawford, one of the plaintiffs in error, was called to the stand, to rebut certain presumptions of fraud that the

defendant in error had tried to raise relating to the books of the firm—for the purpose of showing that the debt was not fraudulently contracted. The plea of discharge in bankruptcy was a plea *puis darrein continuance*. The court refused to allow the defense to proceed, on the ground, erroneous as we believe, that the plea *puis* waived all defenses, and only the discharge could be shown in evidence. The court rendered judgment on this theory against the plaintiffs in error, having before it only the vital question whether the facts disclosed that the debt claimed in the declaration was in substance and in truth a debt that a discharge in bankruptcy would not bar. *On the next day* indeed defendant in error attempted to withdraw his objection to the defendants putting in their case—but the case had closed. The judgment was for $9,690, but only, as we have seen, on a one-sided presentation of the evidence.

An appeal was then taken to the Appellate Court of the First District of Illinois. By a singular fatality, one of the three justices of the court while sitting below at *nisi prius*, had, at one time in an early stage of the case, had a branch of it before him, and consequently refused to sit upon it on appeal. The other two justices *failed to agree*, and a *per curiam* opinion was rendered (102 Ill. App., p. 566), briefly outlining the points involved, and stating that "Many of the questions thus involved are important and not easy of decision," and that the remaining justices "are unable to agree on the main questions involved," and concluding, "The judgment therefore stands affirmed."

This, under the Illinois practice, was the last tribunal before which under ordinary circumstances the facts could by any possibility be at all considered. On appeal to the

Supreme Court of Illinois, that court held (201 Ill., p. 581) (Abst., 265-271) that the case did not, as we had contended it did, come to it precisely as it went to the Appellate Court:

> "The judgment of the Appellate Court is as conclusive upon all controverted questions of fact in this case as in any other, notwithstanding the recitals in the judgment of affirmance showing the disagreement between the two judges who considered the case in that court. The statute makes no exception of such a case. We must regard all questions of fact as settled against appellants, and this includes all inferences of fact arising from facts actually proved."

This is a particularly hard and unfortunate cumulation of circumstances, and the case now comes before this tribunal on the Federal question involved without ever having the facts discussed by a court of review, and with only one side presented before the court of original jurisdiction. We do not urge this in the expectation that this court will depart from its established procedure; but we do submit that the utmost indulgence possible should be extended in considering the record in its legal effect and as bearing upon the federal question involved. With this explanation we proceed at once with our statement of the case.

STATEMENT.

On the 20th of May, 1895, the firm of Crawford & Valentine, composed of the defendants, Richard C. Crawford and Edward A. Valentine, who had been doing a large speculative business as stock-brokers in the city of Chicago, failed, as the result, so it was alleged in the subsequent proceedings between the partners, of heavy losses in speculations upon the Board of Trade in Chicago and elsewhere by one of the partners. (See Abst., 226.) At all events, the assets which were good seemed to be much less than the liabilities. A receiver of the partnership was appointed (the Chicago Title and Trust Company) upon a bill brought by one of the partners against the other, which prayed that such a receiver should be appointed to take possession of the assets of said copartnership and convert the same into money, and out of the proceeds thereof distribute the same ratably among the creditors of said copartnership. The final result was the payment on May 5, 1896, of 15 per cent only of the liabilities of the firm as a dividend upon such liabilities as were proven. (Abst., 175.)

It especially behooves those people who are engaged in the business of stockbrokers to remain solvent. If they would keep a shred of reputation with the persons who deal with them they must not be unfortunate in their business or become loaded down with bad debts or in any way fail to keep their obligations, for views, aspects and standpoints of the business relations between customers and brokers change with chameleon-like rapidity, when the broker becomes insolvent. As we shall attempt to point out hereafter, legal fictions then become established truths, which it is heresy to deny. Even in the great financial centers

where the stockbrokerage business is most legitimately carried on and where actual certificates of stock to the amount of millions upon millions of dollars pass from hand to hand every day, there never was a failure of stockbrokers where charges and counter-charges of criminality, embezzlement and fraud were not freely bandied about.

Naturally, therefore, in the present case, where the plaintiffs in error were doing a large business in Chicago, in eastern securities necessarily through New York and Philadelphia correspondents, securities which could only be bought or sold in such distant states through foreign brokers by wire and "carried" in such states and by such brokers for the plaintiffs in error here, there was a confusion and hotch-potch of claims and interests which inevitably resulted in an outcry of this kind. Each creditor became possessed of an idea that he could in some way so solve the knotty legal problems which are involved in the relations of stockbrokers and their customers and their correspondents that he could "attain the unattainable and catch the uncatchable," that is, that he could in some way distinguish and identify stock and certificates of stock in which he was interested from the general assets of the firm by asserting the misappropriation or conversion of some particular stock, or accomplish in an indirect way the same result by forcing the friends of the young men in question to pay their indebtedness under the threat of a judgment on which a capias could be issued and imprisonment result.

The young men had saved nothing from the wreck and some creditors (reduced, finally, however, only to the defendant in error) pressing them with unrelenting acrimony and persistency, they took the benefit of the Federal Bankruptcy Act and were on the 5th day of April, 1900, discharged "from all debts and claims which are made provable

by said act against their individual and copartnership estates, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." (Abst., 232.)

This present suit, one of the results or *sequelae* of the failure in 1895, was begun in case by the plaintiff on July 30, 1897, against the defendants, Crawford & Valentine, and a declaration of ten counts (printed in full in the abstract, 7-23) was filed. Of these ten counts five were framed on the theory that certain stock belonging to the defendant had been "converted," the skeleton of each count being about this:

> "John E. Burke, plaintiff, complains of Richard C. Crawford and Edward A. Valentine, defendants, in a plea of trespass on the case, for that Whereas, on, etc., the said defendants, were stockbrokers * * * and Whereas the said plaintiff * * * had retained and employed the said defendants as the brokers and agents of the said plaintiff to buy, hold and carry stocks for and on account of the said plaintiff and subject to said plaintiff's orders for reward to said defendants * * * and said defendants accepted * * * said employment, and, Whereas the said plaintiff * * * caused to be delivered to and placed in the control of the said defendants as the brokers, agents and pledgees of the said plaintiff.....shares of the stock of the Metropolitan Traction Company, to be held as a pledge and to be carried and kept on hand by the said defendants for and on account of the said plaintiff, and subject to the orders of the said plaintiff, and for and as a pledge and security to the said defendants for the payment to them by the said plaintiff of the sum of .....dollars loaned and advanced or caused to be loaned and advanced by the said defendants to the said plaintiffs, and the said defendants on the day and year last mentioned accepted and received the said.....shares of stock for the purposes aforesaid, and thereupon it became and

was the duty of the said defendants as such pledgees and as the brokers and agents of the said plaintiff to hold, carry and keep on hand the said ..... shares of stock for and on account of the said plaintiff and subject to the orders of the said plaintiff; yet the said defendants, not regarding their duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in this behalf, afterwards, to-wit, on, etc., wrongfully, wilfully and fraudulently and without the knowledge or consent of the said plaintiff and without requiring payment of said loan and without any notice to the said plaintiff whatever, sold, delivered and disposed of all the said .....shares of stock of the said plaintiff * * * and then and there wilfully and fraudulently and with intent to injure, cheat and defraud the said plaintiff, converted the said shares of stock and the proceeds of the sale thereof and plaintiff's reversionary interests to the said stock to their own use, by means whereof the said..... shares of stock and the proceeds of sale thereunder and plaintiff's reversionary interest in said stock, were wholly lost to said plaintiff."

The other five counts were framed as claims for money obtained by false and fraudulent representations.

To all of these charges the defendants filed pleas of the general issue (not guilty) on September 20, 1897. To these similiters were filed by the plaintiff (Abst., 24-25). After obtaining their discharge in bankruptcy, on April 5, 1900, the defendants filed (on April 12, 1900) notice of special matter (to-wit, their discharge in bankruptcy), which they proposed to give in evidence under the said pleas of the general issue. The plaintiff objected to leave being granted to file this special notice, but it was granted over his objections. (Abst., 26-27.)

On January 3, 1901, by leave of the court (but without withdrawing or waiving any plea or other matter heretofore

filed, unless by operation of law it was so waived or withdrawn) each of the defendants filed a special plea setting up his discharge in bankruptcy, and alleging that "the said supposed causes of action are not nor is any one of them in respect to any such debt or debts as are or is by said act excepted from the operation of a discharge in bankruptcy."

To this the plaintiff replied that his demand is of such a character as brings it within the class of debts excepted from the operation of the Bankruptcy Act, and hence that it is not barred by appellant's discharge.

On the issues by these pleadings framed, the cause came to trial before Judge Dunne in the Circuit Court without a jury on January 30, 1901. The plaintiff offered a large amount of evidence, including his own very extended testimony, giving in detail the history of his transactions with the defendants, two long depositions taken in Philadelphia of stockbrokers there who were connected with said dealings, according to the plaintiff's theory of the case, the deposition of William E. Kent, who had been connected with them here, the testimony of two persons connected with the Chicago Title and Trust Company the receiver appointed in the suit of *Valentine* v. *Crawford* at the time of the failure, the testimony of a professional accountant and of the plaintiff's former confidential legal adviser, besides documentary evidence from the defendants' books, etc., the latter alone making about one hundred and fifty pages of the record. In all there were over four hundred and fifty pages of evidence offered by the plaintiff, all of which has been duly and fully abstracted. When the plaintiff rested, the defendants' counsel offered Mr. Crawford, one of the defendants, as a witness to prove that the debt for which the plaintiff was suing the defendants was not fraudulently contracted. But the court held (Abst., 231-232) that we could

not introduce such evidence, presumably because we had specially pleaded the discharge in bankruptcy, which had occurred after issue joined, and had thereby become subject to the rule laid down in *Mount* v. *Scholes,* 120 Ill., 394, that by pleading *puis darrein continuance* we had waived all other defenses, and that the material allegations of the plaintiff's declaration must be considered as admitted and could not be denied by us. This ruling he afterwards confirmed by holding, and marking "Held," various propositions of law, marked from 11 to 20, offered by the plaintiff (Abst., 241-242) in which it is asserted as to each of the ten counts of the plaintiff's declaration, "that all the material allegations of matters of fact contained in the said count of the plaintiff's declaration stand as admitted on the pleadings and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said count." The court must also have held "that the material allegations" of the plaintiff's declaration included the assertions in the first five counts that it was "contriving to injure and defraud the plaintiff and wilfully and fraudulently and with intent to cheat and defraud said plaintiff" that the defendants "converted" certain "stock" and "proceeds of the sale thereof" and "plaintiff's reversionary interest in said stock to their own use," since he refused to allow us to prove that the debt was not fraudulently contracted. Similarly he must have held that as to the last five counts the "material allegations" of these counts included the assertion that it was "contriving and intending to cheat, deceive and defraud the plaintiff," that the defendants represented that they were holding and carrying for and on account of the said plaintiffs certain shares of stock and were required to keep certain margins

in Philadelphia upon the same; but this last proposition would seem to us of little consequence, for although the court below held that we admitted these allegations, he also held (Abst., 245) the fourteenth proposition of law submitted by the defendants, to the effect that the plaintiff could not recover on the first five counts of his declaration and also on the remaining counts of the declaration or, in other words, that a recovery on the first five counts would bar a recovery on the remaining five counts. By his opinion (Abst., 245) he said he gave judgment for the plaintiff because he had reached the conclusion that there was a "conversion" of the "reversionary interest" in the stock, and that the plaintiff had "a right to recover in trover." In other words, he held as this court or any other court in its senses must hold, that if we were liable for the conversion, we could not be also liable for a fragmentary portion of the price of the stock, according to the plaintiff's own theory. If there would seem to be an inconsistency in holding that we had admitted these allegations and holding at the same time that we could not be liable upon them, it is due to the marked absurdities into which adherence to legal fictions and technicalities (such as the rule concerning pleadings *puis darrein continuance*, may lead the clearest minded judge.

We take issue with the plaintiff in these things: We assert:

First. There is nothing admitted by our pleadings. The doctrine of *Mount* v. *Scholes* has no application to this cause.

Second. If anything is admitted by the special plea of discharge in bankruptcy, as a plea *"puis darrein continuance,"* it is *not* these allegations of fraudulent intent in

the first five counts, which are, as we insist, on reason and authority (hereafter to be cited) neither material nor traversable.

These two issues raised questions of reversible error at once, and at the threshold of the case, though perhaps not open to review in this court.

The case being then submitted with practically no evidence on the part of the defendants but the discharge in bankruptcy, the court found that the debt declared on was not dischargeable in bankruptcy, and gave judgment for the plaintiff for $9,690 and costs.

We assign as error the giving of any judgment at all, even on the case alleged and made by the plaintiff, with the evidence concerning the character of the transactions offered by the defendants excluded.

First. Because even if the debt were one incurred by positive fraud, involving moral turpitude, and intentional wrong-doing, it had not been reduced to judgment before the discharge of the defendants in bankruptcy, and the undischargeable debts in bankruptcy do not include debts that were created by fraud unless (a) they have been reduced to judgment or (b) they were created by the defendant while acting as an officer or in a fiduciary capacity which it is admitted these defendants were not.

Second. Because as shown by the plaintiff's own evidence, by which he construed his own declaration, the indebtedness shown by the plaintiff to have existed is also shown not to have been one resulting from "positive fraud involving moral turpitude" as distinguished from implied or constructive fraud or fraud in law.

Thus the main issues on our assignments of error raised in this writ of error are two:

First issue: On the legal effect of a discharge in bankruptcy upon any debt created by fraud even positive in its character involving moral turpitude, unless said debt has been reduced to judgment or unless the fraud was committed while the defendant acted as an officer or in a fiduciary capacity (which the plaintiff below disclaimed any intention of charging that these defendants were doing).

Second issue: In the character of the case alleged and made by the plaintiff so far as its involving positive fraud and moral turpitude is concerned. Unless there was positive fraud as distinguished even from constructive fraud or fraud in law, the plaintiff himself admits the validity of our discharge in bankruptcy.

It is only on the first issue as we have above indicated, that the history and nature of the dealings between the plaintiff and the defendants become involved, but since in it it is involved, it is necessary to make clear here in the statement our position in regard to them. We should have preferred in this statement not even to have suggested an argument of the case, but it is impossible to state clearly the questions at issue between the opposing parties in this law suit, without giving the theories concerning the same state of facts which those parties and their counsel respectively hold, and we shall not therefore endeavor to do so; and this necessarily implies, to some extent, an argumentative statement.

The dealings and transactions between the plaintiff and defendants, as we understand them, were these:

Prior to July 1, 1894, the plaintiff (defendant in error) who was a lawyer in Chicago, formerly assistant United States district attorney, had been dealing or speculating in

stocks of various kinds through the firm of Valentine & McAvoy, a firm of stockbrokers in Chicago, composed of one of the defendants and a third person not interested in the present suit, named McAvoy (Abst., 37). On the 1st of July, 1894, the new firm of Crawford & Valentine was formed as successors to Valentine & McAvoy, and the "account" of the plaintiff was transferred to the new firm. Among the stocks in which Burke had been speculating through Valentine & McAvoy and of which he had a credit on the books of Valentine & McAvoy, was "Metropolitan Traction" stock at New York, being stock of the par value of $100 a share, of a street railway corporation in New York City. (Abst., 38.) The stock was not listed at that time anywhere on stock exchanges, although afterwards listed in New York, but Philadelphia was practically the only market for it. Practically never a certificate of a share of it was held or seen in Chicago, and Chicago people who speculated in it simply gave orders to Chicago brokers to buy or sell for them so many shares of Metropolitan Traction, and the Chicago brokers ordered their Philadelphia correspondents to buy or sell so many shares for them (the Chicago brokers) account, never revealing the name of their principals and hardly ever handling a single certificate of stock (Abst., 137-138), but carrying on, on the one hand, a book account with their customer or client in Chicago in relation to this stock, and, on the other hand, a book account with their correspondents in Philadelphia, in relation to this stock and other speculative and investment securities of New York, Philadelphia and Chicago companies. The book account of this character which Valentine & Crawford as Chicago brokers had with their Philadelphia correspondents, Dick Bros. & Co., and Toland Bros. & Co., included and were connected with their dealings for other

customers besides Burke and also for themselves. (Abst., 133-134.) It is here that the contention and difference between us and the plaintiff on questions of motive and intention take their origin. The plaintiff contends that because of transactions which we regard as regular, legitimate and customary, indeed practically inevitable, if a stock brokerage business in Chicago dealing with eastern securities is to be carried on at all (transactions which are open to criticism as we think, if at all, only on a subsidiary and unessential question of the professional ethics of stock dealing, which discourage a broker's personally trading in the same kinds of stocks which customers are buying or selling through him), stock actually belonging to the plaintiff was fraudulently converted to the personal use of the defendants, and that money which we regard as properly paid by the plaintiff to the defendants as "margins" so-called according to the usage and custom of the trade, having regard to the contract between the defendants and the plaintiff and the market price of the stock, was as a matter of fact obtained from the plaintiff by the defendants by false and fraudulent representations as to the stock which the defendants had "on hand." At all events whatever the relations of the plaintiff were with Valentine & McAvoy they continued to be with Crawford & Valentine. (Abst., 38.) The plaintiff, by what we regard as a pure legal fiction, originally invented by the New York Court of Appeals as a usable hypothesis (like some of the tentative propositions of the higher mathematics) from which to work out rights and remedies in a particularly knotty class of cases, chooses to regard the defendants as coming on the 1st of July, 1894, into the possession and control of certain certificates of Metropolitan Traction stock of which he, the plaintiff, was the owner, and on which they, the defendants, had loaned him money. We, on the other hand (believing

that we are holding to the real truth of things and avoiding legal fictions), hold that on that day Crawford & Valentine simply assumed a contract which Valentine & McAvoy had previously made with Burke by which they, Crawford & Valentine, held themselves liable to have on hand, or to obtain it if they did not then have it, at any time at which they might be ordered by the plaintiff to deliver it to him or to his vendee on his order, a certain amount of Metropolitan Traction stock or else to respond in a money settlement for such profits as the plaintiff could make by any such sale. The contract on the part of Burke, the plaintiff, was, to give the defendants a small commission and interest charge on the amounts nominally involved in the transactions as compensation for their assuming this liability, and also to assure the defendants against loss in case the stock went down in market price. In other words as to 450 shares of Metropolitan Traction stock (which was the amount to the credit of Burke on the books of Crawford & Valentine, when the later began business) (Abst., 38), the defendants and the plaintiff made a contract by which the defendants agreed for a small commission to be liable for the profit if the stock went up in market price, and the plaintiff agreed to protect the defendants against the loss if the stock went down, and to keep sufficient security in their hands for that purpose at all times. This subsisting contract was varied from time to time by subsequent arrangements between the parties and was partially carried out at various times as demanded by one side or the other. It is to be remembered that most of this time similar contracts were in existence as to other stocks between the plaintiffs and defendants. There was American Sugar Refinery stock under the name of "Sugar" (Abst., 56), Philadelphia and Reading Railroad stock under the name of "Reading," and Chesapeake and Ohio Rail-

way stock under the name of "Chesapeake & Ohio" (Abst., 44), and Chicago Gas Company stock under the name of "Gas," all speculated in by the plaintiff with the defendants just as he speculated in "Met. Trac.," as this Metropolitan Traction stock was known on the exchanges. But fortunately for Burke the contracts in relation to these other stocks were all completed, fully carried out on both sides before the failure of the defendants in May, 1895, so that we have only to occupy ourselves with the contract about the Metropolitan Traction stock in its various phases. Our view of the transactions between Burke and Crawford & Valentine, which involve this contract, is this:

On July 1, 1894, as we have seen, Crawford & Valentine undertook to have on hand or to obtain it, if they did not then have it, at any time at which the plaintiff might order them to deliver it to him or to his vendee and pay them the market price—on the day he made his contract with Valentine & McAvoy—450 shares of Metropolitan Traction stock, and Burke agreed to pay them a small sum on the nominal amount involved if he ordered them to deliver to his vendee, and in any event to protect the defendants against loss by keeping the "deal margined." Thus the contract stood until September 28, 1894, when Burke, by ordering, "in the language of the game," fifty more shares of Metropolitan Traction stock "bought" and Crawford & Valentine, by undertaking the order, extended this "deal" to 500 shares in place of 450—the last fifty shares to be forthcoming on demand and on the payment of the market price of September 28, 1894. (Abst., 38.) So the matter continued until December 20, 1894, when, in pursuance of his part of the contract to keep sufficient security in Crawford & Valentine's hands to indemnify and secure them against loss at all times, Burke gave them $2,000 in cash. (Abst., 42.) On January

11, 1895, in pursuance of the same contract, which was at that time unchanged, he gave them $2,000 more, and on January 25, 1895, Mr. Burke called upon Crawford & Valentine partially to fulfill their part of the contract and to sell for him and to deliver the vendee 300 shares of Metropolitan Traction stock.

They promptly complied. They happened to have more than that amount under their immediate control with their correspondents in Philadelphia, and ordered it delivered out, accounting properly for the transaction in their account with Burke. But it would not, in our view, have altered the nature of the transaction one whit or been any default in the contract on Crawford & Valentine's part, if they had, instead of actually delivering stock which they had under their control in Philadelphia, first bought it for such delivery, or even had they avowedly settled with Mr. Burke on the basis of the market price upon the day he ordered it sold, and credited him and accounted to him in any proper way in their ledger account with him on such basis.

Judge Lowell, in the United States District Court in Massachusetts, in a late case, to be cited and discussed in our argument (*In re Swift,* Federal Reporter, Volume 105, page 493), well shows how "shadowy" and "vague" and "against logic and common sense" is the obligation, brokers themselves are disposed to recognize through a mere "custom of the trade," "to do something," "even before the stock is finally demanded."

On the next day, according to our view (January 29, 1895), a further modification of the existing arrangement was made by Crawford & Valentine. As they had previously assumed the contract which Valentine & McAvoy had with Burke, they assumed one which Jamieson & Co., other stockbrokers of Chicago, had with him, and added an obligation

to account to Burke, when demanded, for 300 more shares of Metropolitan Traction stock, beyond the 200 with which the sale of the day before had left him credited. This made 500 shares again for which they were in this manner accountable to him, and on the same day, in further compliance with his part of the contract, Burke, at Crawford & Valentine's demand, gave them another $1,000 for security or "margin." So the account stood until March 28, 1895, when Burke increased the "deal" by ordering "bought" fifty more shares, making 550 shares of the stock as the matter of account between the parties. The market price of the stock continually falling, Crawford & Valentine demanded still more "margin" as security, to wit, $3,800, which, by the assistance of a friend, Mr. W. E. Kent, Burke was enabled to give them on April 1st. (Abst., 44.)

Three thousand three hundred dollars of this (in accordance with a promise to Mr. Kent, conditioned on the stock going up) they paid back on May 14. (Abst., 46.) On May 20, 1895 (Abst., 50-51) the crash came, and Crawford & Valentine went to the wall. They were at that time, according to our view of the dealings between the parties as above sketched, under a contractual obligation to deliver to Burke, at his demand and on the payment of $44,718.71, 550 shares of Metropolitan Traction stock, the market price of which on that day was $52,181.25. In other words, they were, according to the undertaking which they had made with him on a good and valid consideration which he had carried out, under obligation to give him property worth, on the market, $7,462.54 more than he was obliged to pay them for it. (Rec., 417; Abst., 218; Rec., 470; Abst., 234.)

There is nothing to throw the slightest doubt on the proposition that had this stock been demanded by Burke for himself or for delivery to a vendee, even the day before the

failure, it would have been forthcoming. It is quite true that there was no such stock in the immediate present control of Crawford & Valentine for reasons to be hereafter detailed, but all that this meant to any of the parties to the matter was that Crawford & Valentine would have had to buy it on the Philadelphia exchange—a matter of telegraphing to Philadelphia and a five minutes' transaction there. To have thus procured and delivered the stock would have cost them exactly $7,462.54 over what Burke was obliged by the terms of his contract to pay them, and on payment of that sum to Burke, it goes without saying, he would have been just as well pleased as with the stock itself. For, if, for any reason, he preferred the latter, all that it was necessary for him to do was to add the sum thus paid him to that which he would have been obliged to pay Crawford & Valentine to make himself entitled to the stock, and to send the aggregate to Philadelphia to brokers whom he knew and to get the stock itself.

But on the 20th day of May, what would have been possible to Crawford & Valentine the day before was absolutely impossible. Their true condition had become known to themselves and to the world. The dice were down. The crash had come. Mr. Burke says he did not demand "that the stock be delivered to him and offered to pay the money," but that he went to Crawford & Valentine's office and ordered the stock "sent on from Philadelphia to this place to be taken up here and paid for." (Abst., 51; more fully Rec., 109.) Mr. Kent, his witness, says:

> "I went immediately subsequent to the failure to Crawford & Valentine to their office with John E. Burke, and made a demand for that stock; being prepared at that time to take it up and pay for it." (Abst., 194.)

So, that, despite Mr. Burke's own disclaimer of doing just what it was right and proper for him to have done, we

may assume that he did practically make a demand for 550 shares of Metropolitan Traction stock, and practically declared himself ready to pay the $44,718.71 necessary to entitle himself to it under the contract. Crawford & Valentine then, in our view, for the first time defaulted on their part of the contract and for the first time became liable in any damages or were guilty of any wrong to Mr. Burke. The wrong was only the wrong that any man commits on another when even involuntarily and by misfortune he defaults on a contract with him, and the damages for which they were liable were plainly the difference between what Mr. Burke could buy the stock for on the open market on that day and what he had to pay Crawford & Valentine for it under his contract with them. That amount was $7,462.54. It was this amount with interest for which judgment was given below. It was an indebtedness which existed from Crawford & Valentine to Burke, until, harassed and pursued unrelentingly by the plaintiff in an action in tort, which could have had, as distinguished from an action in assumpsit to which no defense could have been made, no other end or purpose than to imprison the defendants or to induce by fear of it their innocent friends and relatives to pay their debt, they sought and obtained, as we contend, the legal discharge of it in bankruptcy.

Of course the view we have given above of the relations which existed between the plaintiff and the defendants, which makes them purely contractual, is not that which the plaintiff takes. It would undoubtedly have suited him well enough as "a working hypothesis" concerning these relations as long as Crawford & Valentine were solvent and able to live up to the rules of the rather hazardous game that he and they were playing under the more dignified name of "dealing in stocks"; but when they failed it was not un-

natural that legal fictions became with him fixed ideas. He argued himself into the belief that because he had gone to stockbrokers and said "buy me Sugar," "buy me Metropolitan Traction," "buy me Reading," and then after putting up with the brokers as "margins" a small fraction of their value, not more than 10 per cent., had watched the tape and ticker, until he concluded to say "sell Sugar for me," "sell Metropolitan Traction for me," etc., and then had settled with the brokers at the figures which the accounts of the brokers seemed to show the profit or loss to be, he had actually purchased certain stock for investment; had received it; had given it to the brokers as collateral, and had received from them a loan of the unpaid balance due upon it, and that the brokers, therefore, had in their hands certain stock which could be and was the subject of conversion by them and of a suit for trover or conversion by him. How he would have explained the transaction where the sale came first and the purchase afterwards, which quite as often happen in the course of this kind of business, as the other way, we do not know.

But according to Mr. Burke's view of these transactions he had before July 1, 1894, 450 shares of Metropolitan Traction stock in Valentine & McAvoy's hands as security for a very large amount of money (he says $45,948.28 (Abst., 38) which would be within about 10 per cent of its whole value). On July 1, 1894, Crawford & Valentine succeeding to the busines of Valentine & McAvoy, took this indebtedness from Burke and the stock as collateral. (Abst., 38). On September 28, 1894 (Abst., 39), Crawford & Valentine came into possession as property of Burke's, simply in further pledge for an increased indebtedness amounting now to about $52,600, of fifty more shares of Metropolitan Traction stock, and on January 29, 1895 (Abst.,

39) of 300 more on the same conditions, the indebtedness on this last date being increased by $24,000. On March 28, 1895 (Abst., 39) they further came into possession of fifty more shares as a similar pledge, the indebtedness then being increased by about $46,500. On December 20 they took $2,000 as payment on the indebtedness (Abst., 42). On January 11 another payment of $2,000 on the indebtedness (Abst., 42); on January 29 still another payment of $1,000 (Abst., 42); on April 1 a payment of $3,800, of which, however, they afterwards refunded $3,300 to William E. Kent, from whom they took it (Abst., 43). Besides these sums $1,750 was received by Crawford & Valentine as dividends on this stock before May 20, 1895. It is evident that if nothing had been sold from this alleged pledged property in the hands of Crawford & Valentine there would have been at the time of their failure 850 shares of Metropolitan Traction stock belonging to Burke and subject to an indebtedness of say $74,000. Mr. Burke ordered 300 shares, however, sold on January 28, 1895, and they were reported to him as sold, as he declares, and were believed by him to be sold on that day, and the proceeds, $27,000, accepted by him on his account (Abst., 41). If he stood by this transaction it is then evident that he would claim on his theory of the case that on May 20, 1895, he should have had 550 shares Metropolitan Traction stock in Crawford & Valentine's hands, which should have been given him upon the payment by him of approximately $45,000. He says that he offered to pay what was due and demanded then for the stock and did not get it, because, as he then found for the first time, it had been sold without his knowledge or instructions or consent, and that this was practically embezzlement or theft and for the purpose of this suit positively fraudulent conversion. The relations he al-

leges were not contractual, but in fact those of depositor and depositary of personal property. But Mr. Burke does not stop here. He says that this 550 shares which he should have received were converted not all together and not at the time of the failure or just before it, but at such times as to give him a claim for a much larger sum than the difference between the amount of the indebtedness shown by the accounts and the market price upon the date of failure. Thus he says that Crawford & Valentine began by selling 100 shares of his property on October 24, 1894, and that the market price then was $10,925, which should have been credited to him at that time (Abst., 48). That they sold another 100 shares of his stock upon the 10th of January and got $10,075 with which he should be credited, and another 200 shares on January 11 for $20,300 with which he should be credited, and that this left them with but 100 shares of his stock to sell when, upon January 28, he ordered the 300 shares sold (Abst., 47); that he should be credited with $9,000 for the 100 shares of his then sold; that 350 shares afterwards coming into the possession of Crawford & Valentine, belonging to him, were sold without his knowledge and consent; 300 shares upon March 13, for $20,025; and 50 shares upon April 16 for $4,468.75, and that with these two he should be credited, and that he figures that after the payment of the check to Mr. Kent, Crawford & Valentine had about $12,200 of his money when they failed (Abst., 52). He admits that it is true that Crawford & Valentine had under their control upon January 28, 1895, more than 300 shares of Metropolitan Traction stock, and that they duly sold on his order and for his account and duly credited him with the proceeds of 300 of those shares, but he says the 200 of those shares were some which they had bought subsequent to their sales of January 10 and 11, and that as there was a lapse of some four or five days, when they did

not have more than 100 shares of Metropolitan Traction stock in their control, he will not admit that more than 100 shares of the 300 shares sold on January 10 and 11 belonged to him (Abst., 48, 59).

Thus, says Mr. Burke, there being on this occasion of Crawford & Valentine's failure no stock forthcoming, when there should have been certificates for 550 shares of Metropolitan Traction stock tendered to him upon the payment of his debt, and it being shown that the defendants sold this stock without his instructions, without his knowledge even, and without any right, they are liable to him in tort for its value at the times of such unauthorized sales, no substitution or commutation or anything of that sort to be allowed or considered. Therefore, too, he says the debt is one fraudulently contracted, and in the view of the law entertained by the plaintiff, not released by a discharge in bankruptcy.

It is a very simple matter, this. One would not have imagined from the plaintiff's statement of his case below that there was anything more to it than the simple sale of property belonging to the plaintiff by the defendants to whom it had been confidentially entrusted. One would never have supposed that Crawford & Valentine not only never handled or saw a share of this Metropolitan Traction stock of which Mr. Burke is talking; much less had it in their possession; but, further, that Mr. Burke knew perfectly well that they never had so seen or handled or possessed it, and never by any possibility could do so, unless and until he paid in full for such stock and ordered it to be sent on here from Philadelphia. But this appears absolutely from the evidence, despite Mr. Burke's reluctance to testify about it. (Abst., 53, 54).

Now, this brings us to the matters of the dealings in

Philadelphia between the defendants and certain Philadelphia brokers, which dealings had greater or less connection with the transactions out of which this suit grew. If we omitted them in originally describing those transactions it was because in our view they constituted no essential part of them. In it they belonged to the category of things well described by Judge Lowell in the *Swift* case *supra* as "vague" and "shadowy" obligations which the custom of brokers recognizes "contrary to logic and common sense," to "do something before the stock is finally demanded." But we hold as Judge Lowell does, that "although brokers would probably not consider that one of them fulfilled his contract unless he purchased at once the stock for which the customer put up the margin," yet that the broker is really bound by the contract with his customer, "even when the former advances part of the price," "to no more than this, *to deliver the stock to the customer at any time that the customer tenders the balance of the price. There is no obligation resting on the broker to buy shares in the first instance or even to refrain from disposing of them during the existence of the contract, so long as he delivers them when the customer tenders the money and demands performance.* * * * If the broker is solvent the customer is protected in any case. If the broker is insolvent he is protected in neither."

But in reality Mr. Burke's theory of the case, equally with ours and without any such reason for it, ignores in one sense the Philadelphia transactions. To be sure, in another way he makes much of them, going into the details of the account between Crawford & Valentine and Dick Bros. & Co. to prove his contention, that his stock was sold and converted by the former at various times; but when he cites "authorities" and attempts to apply rules laid down by

courts in this and other states to the facts of the case at bar, he ignores the most important fact at all, even on his own theory. All these cases (founded on the legal fiction invented by the majority of the court in *Markham* v. *Jourdain*, 41 New York, 49) relate to transactions where between the parties to the litigation it was expected by the customer that the broker would buy (according to this custom of brokers already alluded to) the stock, and keep it in his own hands; but in the case at bar this was never expected by Burke. The very utmost that could have been claimed by him on his own theory is that he instructed Philadelphia brokers to "purchase" or "receive" or "take over stock" to be paid for by said Philadelphia brokers, and to be "carried" in the name of said Philadelphia brokers until he should again instruct said defendants to order said Philadelphia brokers to sell the same (Abst., 40, 50). Perhaps it might be claimed also that the arrangement included, according to the customs and usages of the stock exchanges in Chicago and Philadelphia (of which Mr. Burke was cognizant) a guaranty on the part of the defendants to the plaintiff that so far as he was concerned they would protect the contract so made by the Philadelphia brokers. But there certainly could never be any trusteeship on the part of the defendants thus created, nor did there come nor were there expected to come nor could there ever come under the arrangement any property whatever into the hands of the defendants belonging to the plaintiffs, and, therefore, as we insist, no one of the line of cases on which plaintiff relies could be applicable; for they are all based on the assumption that the broker has actually in his possession certificates of stock which he has bought at the instance of the customer and his holding to meet his demand.

The case here is very different. Mr. Burke, when he or-

dered Crawford & Valentine to buy or sell stock, no certificate of which ever circulated in Chicago, knew also perfectly well that in whatever language such order was couched, Crawford & Valentine would not "buy" or "sell" stock. (See Abst., 53-56.) On his own theory he was requiring Crawford & Valentine by telegraphic communication to instruct somebody in New York or Philadelphia to buy that stock for the account of Crawford & Valentine, and he must have known by the nature of the business that this gave him no further security in his transactions beyond Crawford & Valentine's solvency and their willingness to respond to their contracts. For he knew that he was not the only customer of Crawford & Valentine, and he knew that any one of hundreds of such customers might desire to sell Metropolitan Traction stock. He knew that in the ordinary course of business in such a case Crawford & Valentine would order their correspondents in Philadelphia to sell for their (Crawford & Valentine) account so many shares of Metropolitan Traction stock. He knew that as between the brokers in Chicago and their correspondents in New York absolutely no account was taken of the principals of the Chicago brokers, but that all dealings were between brokers and in the name of the brokers only, and that no particular stock or certificates of stock were held even for such brokers. (Abst., 62, 63.) He knew, therefore, that if he had ordered 300 shares of Metropolitan Traction "bought" and Crawford & Valentine had so "bought" and Mr. Pullman had subsequently ordered 300 shares of Metropolitan Traction stock "sold" and Crawford & Valentine had so ordered it "sold," the Philadelphia brokers would buy the stock and credit it to Crawford & Valentine's account, because of the order given by Crawford & Valentine when Burke instructed them to "buy," and would sell the same amount of the same

stock upon the order of Crawford & Valentine and debit their account with it when Pullman instructed them to "sell," and that afterwards these Philadelphia brokers would have no Metropolitan Traction stock for Crawford & Valentine, but that both Burke and Pullman would have contracts with Crawford & Valentine, and that only (Abst., 133, 134). Mr. Burke was not like the innocent in the play who could not see how stocks could be "sold" until they were "bought." He was a seasoned speculator (Abst., 55) and knew that such a transaction would be perfectly regular, and yet leave Crawford & Valentine no Metropolitan stock whatever.

Now this, according to our idea, is exactly what did happen in that identical form, and in a slightly modified one in the transactions between Crawford & Valentine in Chicago and Toland Bros. & Co. and Dick Bros. & Co. in Philadelphia in relation to Metropolitan Traction stock. Take Dick Bros. & Co.'s account with Crawford & Valentine (Abst., 159, 160). On turning over the contract that these gentlemen had with Valentine & McAvoy concerning 450 shares of Metropolitan Traction stock, to Crawford & Valentine and accounting to them for it on July 2, 1894, they, Dick Bros. & Co., credited Crawford & Valentine with 450 shares of Metropolitan Traction stock they were then "carrying" for Crawford & Valentine. All the subsequent dealings with Metropolitan Traction are perfectly easy and simple to understand by collating Crawford & Valentine's books with Dick Bros. & Co.'s account. On August 25, 1894, one Emma F. Prentiss, having ordered five shares of Metropolitan stock "bought" by Crawford & Valentine, they order five more shares bought for them by Dick Bros. & Co., and they were credited with 255 shares on the books of Dick Bros. & Co. On August 30, however, Dick Bros. & Co.

shipped five shares to Crawford & Valentine, who delivered them to Mrs. Prentiss, as she had demanded them. Similarly on August 31, on account of an order by Mrs. Prentiss, Crawford & Valentine ordered Dick Bros. & Co. to buy ten more shares for their account and then had 450 shares credited to them. On September 10 Mrs. Prentiss gave another order for ten shares to Crawford & Valentine and Crawford & Valentine gave another order for that amount to Dick Bros. & Co., but these twenty shares were also, at Mrs. Prentiss' demand for them from Crawford & Valentine, demanded from Dock Bros. & Co. by Crawford & Valentine and delivered to them (Abst., 65, 66). So that 450 shares only remained credited to Crawford & Valentine on the books of Dick Bros. & Co. on September 30, 1894. On October 1, 1894, Burke ordered fifty shares "bought" and Crawford & Valentine ordered fifty shares bought by Dick Bros. & Co. (Abst., 66, 67).

This dealing in Philadelphia was in essence, and really, we hold, merely an "insurance" or "reinsurance" of the risk they were taking in their stockbrokers' contract with Burke. Instead of making themselves liable to Burke without recourse on anybody else, to furnish him fifty shares of stock, when he might demand it at the market price of October 1, 1894, they chose to reinsure themselves on "half a commission" (see Abst., 97, 141), by buying in Philadelphia for their own account. Relieved of all legal fictions this was the exact situation.

After that there were no transactions until October 24 (Abst., 67). On that day Joseph R. Wilkins, one of Crawford & Valentine's customers, ordered Crawford & Valentine to "sell" for him 100 shares of Metropolitan Traction stock (Abst., 68). Crawford & Valentine did not ask Mr. Burke's permission to do this. It was, according to their

views, and would have been then, according to his, none of his business. But they did the only natural thing in the world for them to do. They ordered Dick Bros. & Co. by wire to sell 100 Metropolitan Traction and on October 25 it was sold by Dick Bros. & Co. account of Crawford & Valentine, and Dick Bros. & Co. had then credited to Crawford & Valentine only 400 shares Metropolitan Traction stock. But it was only a quick "scalp" that Wilkins wanted to make; so on October 29, 1894, five days thereafter, he ordered Crawford & Valentine to "buy" 100 shares of Metropolitan Traction (see Abst., pages 69 and 70) and Crawford & Valentine ordered Dick Bros. & Co. to "buy in" the 100 shares of Metropolitan Traction and then Dick Bros. & Co. had again credited to Crawford & Valentine 500 shares of Metropolitan Traction stock. This transaction, in our view, was the simplest and most legitimate and most natural thing in the world for Crawford & Valentine to have made. It involves no kind of breach of faith or duty to their customer, Burke, who would never have dreamed of objecting to it had he known it at the time, or of supposing he had a right to object to it. It was the merely every day carrying out of an order for a customer to sell and buy in afterwards, on the supposition that the market was going down and the "bears" would have the best of it. But in Burke's theory of this case, as we shall see, it has now a most tremendous importance. The 100 shares sold on October 24, at 109¼, which he knew nothing about, he alleged were his. The 100 shares bought back on October 30 at 109—which he also knew nothing about, and which afterward on January 28, 1895, were sold at his order at 90⅛ (the proceeds being credited to him) he now says were none of his and he wants (which the court below would not allow him) $1,925 more damages on this account alone.

From October 30, 1894, to January 10, 1895, there remained credited to Crawford & Valentine on the books of Dick Bros. & Co. in Philadelphia 500 shares of Metropolitan Traction stock, just as there were 500 shares of that stock credited on the books of Crawford & Valentine to the plaintiff; but on January 10, R. C. Crawford for himself on his individual account (Abst., 74) ordered sold 200 shares Metropolitan Traction. This was just as much a "short" sale as had been the sale on Mr. Wilkins' account in the previous October. It was not any particular stock that Crawford & Valentine were ordering sold "Account R. C. Crawford." It was not any particular stock that Dick Bros. & Co. were selling for them. Least of all was it Mr. Burke's stock. It was merely a short sale for R. C. Crawford's own account by him undoubtedly innocently made and without a thought of any concealment from Burke or anybody else. Mr. Burke himself testified that Crawford told him that he was "bearish" about Metropolitan Traction stock (Abst., 61), and it was natural for Mr. Burke to suppose that being as speculatively inclined as he was, Mr. Crawford would "back his opinions" by his acts. In our view, however, right here is the mistake made by the defendants. Neither jointly, as they afterwards did, nor individually as in this instance, was it wise or prudent for them to "trade" on their own account in Philadelphia in stocks in which their customers or any of them were "trading" with them. Not that it made any practical difference to Burke whether they did it for "R. C. Crawford," as we think they should not have done, or for their customer Joseph R. Wilkins, as we think it was perfectly legitimate and proper for them to do. But it rendered them liable to misconception and to the acrimonious charges afterward made against them. In our theory Crawford & Valentine, neither in this sale nor in the

Wilkins one on October 24, sold Burke's stock; Burke had no stock in their hands or in the hands of anyone else to sell. They sold "short" for R. C. Crawford, however, and the result was to diminish the amount Dick Bros. & Co. held credited on their books for their account from 50 to 300 shares.

Mr. Burke's view of this is different. By considering the Wilkins sale on October 24 a sale of his stock and repudiating the Wilkins purchase on October 29, he figures that on January 10 Crawford & Valentine had in Dick Bros. & Co.'s hands 400 shares only of his stock and 100 shares of their own. When they sold 200 shares "for account R. C. Crawford" then, he figures that 100 of it was their own stock and 100 his, which left only 300 shares of his in the hands of Dick Bros. & Co. This 100 shares of his were sold at 100¾, he thinks, and although these were also bought back and sold at his order on January 28 at 90⅛ and the proceeds credited to him, he repudiates this transaction also and makes another $1,062.50 of additional damages he thinks he should have from this source, because he says that there was but 100 of his shares to sell on January 28. Thus, practically, $3,000 of the additional damages he demands in his assignment of cross errors in the State Supreme Court, Mr. Burke refers to his claim that the 300 shares sold on his order at his price on January 28, 1894, and reported to him on that day, were not his, because the same stock had been for other parties ordered "sold short" and then "bought in" by Crawford & Valentine before January 28.

On the next day, January 11, Crawford & Valentine, still trading for the individual account of R. C. Crawford (Abst., 75), ordered "sold" by Dick Bros. & Co. 200 more shares of Metropolitan Traction, thereby leaving only 100 shares in the hands of Dick Bros. & Co. subject to the con-

trol of Crawford & Valentine. The 200 shares thus ordered, as we say, sold "short for account R. C. Crawford," Mr. Burke says were his stock tortiously converted on January 11; and so, when on January 25 (Abst., 76), for the account of R. C. Crawford, Crawford & Valentine ordered "bought in" (as correlative to that extent to the short sale doubtless) 350 shares of Metropolitan Traction, Mr. Burke declines to consider that he had any interest in the 450 shares which then stood on Dick Bros. & Co.'s books to the credit of Crawford & Valentine—beyond the 100 shares which had remained there all the time.

On the 28th of January Crawford & Valentine seem to have sold for the account of R. C. Crawford 100 shares of Metropolitan Traction stock, that left 350 shares in Dick Bros. & Co.'s hands which Crawford & Valentine controlled.

Then came Mr. Burke's order to Crawford & Valentine on January 28 to sell 300 shares and Crawford & Valentine in the usual course passed on the order to Dick Bros. & Co. and Dick Bros. & Co. sold for account of Crawford & Valentine 300 shares at the market price, and credited Crawford & Valentine with the proceeds and Crawford & Valentine reported to Burke and credited him with the proceeds (Abst., 78, 79).

But Mr. Burke says they had had only 100 shares of his stock then to sell.

Then on February 4 (Abst., 79, 80) the firm of Crawford & Valentine jointly—for "a house account" known as "Stocks and Bonds"—first "sold" and then "bought in" (which seems a favorite method with stock speculators) through Dick Bros. & Co., 50 shares of Metropolitan Traction. On March 13, 1895, for the account of R. C. Crawford, Crawford & Valentine ordered 50 shares Metropolitan sold by Dick Bros. & Co. and again on the same account

March 29 100 shares bought, and on April 17 100 shares sold (Abst., 80, 81, 82).

That left no shares in the hands of Dick Bros. & Co. controlled by Crawford & Valentine.

The transaction shown in the account with Toland Bros. & Co. (Abst., 155, 156) running over a shorter space of time are not different. Beginning with the contract of 300 shares for Crawford & Valentine by Toland Bros. & Co., an order which was given at the instance of the plaintiff and on the occasion of his orders to the defendants, there followed a sale for the joint account of Crawford & Valentine of 50 shares, and, later, of 350 for the individual account of R. C. Crawford, which wiped out on Toland Bros. & Co.'s books any credit to Crawford & Valentine.

In all these transactions with "Metropolitan Traction," as with the great variety of other stocks figuring in the accounts between Crawford & Valentine, Dick Bros. & Co. and Toland Bros. & Co., we hold that there was no more wrong than speculating on insufficient capital always involves, or than the unwise policy of a man who is a broker ever allowing himself to become a principal always entails, no positive fraud committed on Mr. Burke, nothing done that he could not have anticipated at any time might be done, if he stopped in his speculations to think of the true relations of the parties. We do not think that the legal relations between Mr. Burke and the defendants would be, even in New York, regulated by the doctrines of *Markham* v. *Jourdain,* or the cases that follow it, because of the difference between a broker at first hand and a mere "middleman" or "forwarder" or "stock speculator's agent"; but even if Crawford & Valentine had been the real handlers of Metropolitan Traction stock, Judge Lowell, following such judges as Chief Justice Shaw and Judge Devens, says the

law of these stockbroker's transactions as interpreted in Massachusetts imposes on the broker "no obligation to buy shares in the first instance or to refrain from disposing of them during the existence of the contract." (*In re Swift, supra.*)

We hold that the question of whether there was "positive fraud involving moral turpitude" in these transactions, which is the question primarily before this court, on the operation of the bankruptcy discharge in this case, can not depend on whether this court adopts a view of the law held by Judge Hunt in New York, or Chief Justice Shaw in Massachusetts. It might in the one case hold there was "constructive" fraud, and in the other hold that there was none; but it could not, we conceive, hold that there was actual and moral turpitude in either. To do so would be to hold that Crawford & Valentine merely by entertaining the same view of their legal obligations that Chief Justice Shaw, and Judge Devens and Judge Lowell, to say nothing of Judges Grover and Woodruff (the dissenting Judges in *Markham* v. *Jourdain*), entertain, have placed themselves in the category of criminals. We cannot think this for one moment tenable.

As to the counts upon deceit, on our view of the case, they must of course fall with the others, independently of the proposition of the court below that we are and can only be liable on one set or the other of these counts.

If the relations were contractual, and the contract was that the defendants agreed to be liable for the profit to the plaintiff, if the stock went up, and he agreed to protect them against loss if the stock went down, and to keep sufficient security in their hands for the purpose at all times, then it was Burke's duty under that contract to put up in the hands of the defendants the various amounts which he

put up. No representations, therefore, to induce him to put up such margins, were material even if they were made. We have no doubt that margins were figured out upon 500 shares or 550 shares at various times; *that* was no representation that Dick Bros. & Co. for the account of Crawford & Valentine, were carrying the certificates of such shares in Philadelphia. The representation that was made by the defendants was exactly what the plaintiff understood it to be, namely, that they held themselves liable to get the shares and sell them for him when he ordered it, or else pay the profit which he would have made had they procured such stock. In other words, they were liable to him upon a "deal" involving nominally 500 shares of Metropolitan Traction stock, or such other number as the case might be. Of course their books showed that deal with Burke, just as their books also showed in the "R. C. Crawford New York Account" and in the "Stock & Bonds" account that they were themselves speculating in the same stock in Philadelphia. Had they continued in business, Burke's check would undoubtedly have been handed him the minute that he ordered the sale and the market price in Philadelphia had been ascertained.

The calling for and crediting of all the various margins were in the ordinary course of business, and, so far as the evidence shows, entirely without any idea of concealment or bad faith on the part of the defendants.

We are quite aware that much of this statement is argumentative; but we have endeavored to present fairly in it the differing theories of the parties on the same admitted state of facts; and there was no other way that we could see, in a case like this, to bring clearly before the court the question necessary for their consideration.

And that, after all, is the function of the "statement."

If, while presenting our own view, we have omitted anything which would make for the defendant in error as against our contentions, it has been done unwittingly, and it can do no harm, for it will undoubtedly be amply elaborated by the defendant in error himself and the able counsel who assist him.

To recapitulate, briefly, in logical sequence the statement above set forth, the testimony offered develops the following facts:

1. The plaintiffs in error about the 1st of July, 1894, organized a copartnership under the name of Crawford and Valentine, to engage in the business of banking and stock brokerage. The firm was located in the City of Chicago, and succeeded to the business of Valentine & McAvoy, who had been engaged in the same line for a period of time immediately prior to July 1.

2. The defendant in error had for some time been dealing in various kinds of stocks through Valentine & McAvoy, and upon its dissolution and the organization of the new firm (plaintiffs in error) continued his line of business with the latter firm. His manner of dealing in stocks was the same with both firms.

3. At the time of the dissolution of the old firm there appeared upon its books, as a credit to the defendant in error, four hundred and fifty shares of Metropolitan Traction stock. This account entire was transferred by the assent of all parties, to the new firm, the new firm assuming the liability of the old one to the Philadelphia brokers for the purchase money of this stock.

4. On the 28th of September, 1894, the defendant in error placed an order with the plaintiffs in error for the purchase on his account of fifty shares more of the Traction stock, and again, on the 28th of March, 1895, a further

order for fifty additional shares, and on the 29th of January, 1895, had transferred from Jamieson & Co. to his account with the plaintiffs in error, three hundred shares of the same stock. This last bunch of stocks was being held or carried by Huhn & Glendenning, stockbrokers at Philadelphia. All the other shares referred to were carried either by Dick Bros. or Toland Bros. & Co., also stockbrokers at Philadelphia. When the account as to the three hundred shares last mentioned was transferred from Jamieson & Co. to Crawford & Valentine, a corresponding transfer of account, etc., was made between Huhn & Glendenning and Toland Bros. & Co., the latter of whom were, at the time, correspondents of plaintiffs in error.

On the 28th of January, 1895, defendant in error ordered the sale of three hundred shares of this stock, which left credited to his account on the books of the plaintiffs in error the five hundred and fifty shares to which he makes claim in this action.

5. All the Metropolitan Traction stock involved here was ordered by the plaintiffs in error or their predecessors to be bought by the Philadelphia stockbrokers referred to, at Philadelphia, and upon the Philadelphia Stock Exchange. Valentine & McAvoy placed the orders for the four hundred and fifty shares first mentioned with Dick Bros. and when the account of defendant in error was transferred from the old firm to the new a corresponding change was made upon the books of Dick Bros.

6. All of this traction stock was bought by the Philadelphia brokers as correspondents of the plaintiffs in error, and paid for by the Philadelphia brokers for the account of plaintiffs in error or their predecessors.

7. The stock when so purchased was credited to plaintiffs in error account with such brokers, and the account ch^{g}'ged its full purchase price.

8. This stock and the whole of it was held by the Philadelphia brokers as collateral security to the indebtedness of the plaintiffs in error to them.

9. The defendant in error has never been known in any way, or at any time, to the Philadelphia brokers in their transactions with the plaintiffs in error or their predecessors, touching the purchase, holding, and sale of the stock in question.

10. None of the certificates of stock in question has ever been in the possession of the defendant in error nor under his actual and undisputed control.

11. None of such stock was ever paid for or received in the possession of the plaintiffs in error, but remained at all times in the possession of the Philadelphia brokers, as collateral, until sold, and the proceeds applied to the payment of the indebtedness of the plaintiffs in error to them.

12. The defendant in error at no time in his dealings with the plaintiffs in error and their predecessors ever paid anything upon the purchase price of the stocks in question which he claims were being "carried" for him, except enough from time to time to cover margins.

13. The defendant in error knew that the plaintiffs in error dealt through the Philadelphia brokers named, in the same manner stated, and that such brokers held such stock at all times as collateral to indebtedness of the plaintiffs in error to them, and that neither he nor the plaintiffs in error could secure the possession of such stock until such indebtedness had been paid, and that when sold the proceeds would be applied to such payment.

14. The plaintiffs in error during the period of the transactions with them, of defendant in error, bought and

sold Metropolitan Traction stock through the same brokers, on their own account, and for the account of others than the defendant in error.

15. No particular certificates of shares of this traction stock were ever set out from the mass of such stock held by the Philadelphia brokers, as the separate property of defendant in error, or of the plaintiffs in error. It has never been possible at any time, nor is it possible now, for the defendant in error to identify and recover any particular certificate of shares as his, or in which he has an interest. The most he can claim, if he can claim anything, is a redeemable interest in a definitely measured quantity of a mass.

16. All of the holdings of Metropolitan Traction stock by the Philadelphia brokers *in the name and upon the account of plaintiffs in error* were sold and closed out by orders of plaintiffs in error prior to May 1, 1895.

17. Not until the 20th of May, 1895, the day upon which the affairs of the plaintiffs in error passed into the hands of a receiver, in an action to dissolve the partnership, etc., did the defendant in error ever ask the possession or delivery of this stock or offer to pay its purchase price, and then his offer and demand was made in the following manner only. He says:

> "The first thing I did when I went there" (office of defendants) "was to give an order to have the Metropolitan Traction stock which I supposed I had in Philadelphia in the hands of the correspondents of Crawford & Valentine, sent here from Philadelphia to be taken up by me. * * * I gave the order to an employe in the office and also wrote out an order on said Dick Bros. & Co. and upon Toland Bros. & Co. They were the correspondents of the defendants in

Philadelphia where I supposed the stock was." (Abst., 51.)

18. During the period of mutual dealings of the parties the plaintiffs in error kept books of account and rendered monthly statements to the defendant in error showing items in detail on debit and credit side.

19. The inference is clear from the testimony, and from the manner of dealing in stock of various kinds by the defendant in error, that he never intended to pay for and receive into his actual possession any shares of stock, nor to become in fact the owner in good faith of any stock, but, on the contrary, that the sole purpose of his transactions through the plaintiffs in error was the margins or market differences in stocks. In other words, the defendant in error was speculating in market differences and not in shares of stock.

20. As has been said the defendant in error has paid nothing to the plaintiffs in error on the purchase money of this stock, except such sums from time to time as were demanded to cover margins. For that purpose he was paid as follows:

Dec. 20, 1894	$2,000.00
Jan. 11, 1895	2,000.00
Jan. 25, 1895	2,000.00
Jan. 29, 1895	1,000.00
(This last sum was paid to margin 200 shares.)	
April 1, 1895	3,500.00
($3,300 of the last sum was paid in by Wm. Kent for defendant in error and was repaid May 13, 1895.)	

21. The evidence plainly shows that the contracts and dealings between the parties were gambling contracts and transactions in violation of law and public policy, and hence, that such demand as the plaintiff makes is not recoverable.

ERRORS RELIED ON.

The errors relied upon are embraced in the 5th, 6th, 12th and 17th assignment of error, viz.:

That the Supreme Court of Illinois erred in not holding that the discharge in bankruptcy was a bar to the action, and a legal defense thereto.

That the Supreme Court erred in not holding that the Circuit Court erred in refusing to admit the evidence offered by the plaintiffs in error in substantiation of the issue raised by the bankruptcy discharge and the replication thereto.

That the Supreme Court erred in not declaring the demand not recoverable as a gambling transaction and against public policy.

BRIEF.

I.

THE CLAIM OF DEFENDANT IN ERROR IS A PROVABLE DEBT IN BANKRUPTCY UNDER THE BANKRUPTCY ACT OF 1898.

Bankruptcy Act, 1898, Sec. 17; Sec. 1 (11); Sec. 63.

In re Hirschman, 104 Fed. Rep., 69.

T. W. & W. Ry. Co. v. *Clews,* 67 Ill., 383.

Elliott v. *Jackson,* 3 Wis., 649.

Sloat v. *Evans,* 35 Ill., 455.

Western Assurance Co. v. *Towle,* 28 N. W., 106 (Wis.).

Dashaney v. *Rogers,* 21 Pac. Rep., 342 (Cal.).

In re Filer, 125 Fed. R. 261.

In re Silverman, 101 Fed. Rep., 219.

Collier on Bankruptcy, 344, 338.

Beers v. *Hamlin,* 99 Fed. Rep., 695.

In re Hilton, 104 Fed. Rep., 981.

In re Graff, 117 Fed. Rep., 343.

II.

BEING A PROVABLE DEBT, THE CLAIM IS OF SUCH A CHARACTER THAT IT IS BARRED BY THE DISCHARGE IN BANKRUPTCY OF PLAINTIFFS IN ERROR, IT NOT BEING WITHIN ANY OF THE EXCEPTIONS OF SECTION 17 OF THE BANKRUPTCY ACT.

(1) *As stock-brokers, or factors, plaintiffs in error were not "acting in a fiduciary capacity."*

Chapman v. *Forsyth,* 2 How., 202.

Neal v. *Scroggs,* 95 U. S., 704.

Keine v. *Graff,* 14 Fed. Cases, No. 7650.

Hennequin v. *Clews*, 111 U. S., 565.
Grover & Baker Co. v. *Clinton*, 11 Fed. Cases, No. 5845.
Noble v. *Hammond*, 129 U. S., 68.
Upshur v. *Briscoe*, 138 U. S., 375.
Anstill v. *Crawford*, 7 Ala., 340.
Woolsey v. *Cach*, 54 Ala., 383.
Sanders v. *Sanders*, 56 Ark., 588.
Chipley v. *Frierson*, 17 Fla., 642.
Georgia R. Co. v. *Cubbedge*, 75 Ga., 323.
Dupont v. *Beck*, 81 Ind., 274.
Phillips v. *Russell*, 42 Me., 361.
Hyman v. *Powl*, 7 Met., 330.
Halpin v. *May*, 100 Mass., 499.
Cronan v. *Cotting*, 104 Mass., 245.
Woodward v. *Towne*, 127 Mass., 42.
Green v. *Chilton*, 57 Miss., 599.
Gibson v. *Gorman*, 44 N. J. L., 327.
Palmer v. *Hussy*, 87 N. Y., 308.
Lawrence v. *Harrington*, 122 N. Y., 408.
Mulock v. *Byrns*, 129 N. Y., 25.
Bissell v. *Couchine*, 15 Ohio, 64.
Curtis v. *Waring*, 92 Pa. St., 109.
Scott v. *Porter*, 93 Pa. St., 40.
Pankey v. *Nolan*, 6 Humph., 155.
Hammond v. *Noble*, 57 Vt., 200.
Slayton v. *Wells*, 66 Vt., 63.
Wilson v. *Kirby*, 88 Ill., 570.
Straw v. *Jurgens*, 144 Ill., 507.
Shepherd v. *Furness*, 153 Ill., 590.
Pierce v. *Shippee*, 90 Ill., 376.
Am. & Eng. Ency. of Law, Vol. 16, p. 781 (2d Edit.).
In re Basch, 97 Fed. Rep., 761.
Bracken v. *Milner*, 104 Fed. Rep., 522.

(2) *The clause "fraud," etc., used in subdivision four of section 17, is limited and restricted by the qualifying clause "while acting in a fiduciary capacity." There being no fiduciary relation between the parties, the debt is not within the exception, and hence is barred.*

In re Rhutassel, 96 Fed. Rep., 599.
In re Hirschman, 104 Fed. Rep., 69.
In re Lewinsohn, 99 Fed. Rep., 74.
Hargadine-McKitrick Co. v. *Hudson*, 111 Fed. Rep., 361.
Gee v. *Gee*, 87 N. W., 1116.
In re Bullis, 73 N. Y. Supp., 1048.
Allen v. *Ferguson*, 85 U. S., 1.

III.

"FRAUD," AS USED IN THE ACT, MEANS POSITIVE FRAUD, INVOLVING MORAL TURPITUDE—NOT CONSTRUCTIVE FRAUD, OR FRAUD IN LAW. CONVERSION BY ONE IN LAWFUL POSSESSION OF PROPERTY IS NOT "FRAUD" WITHIN THE MEANING OF THE BANKRUPTCY ACT. HENCE THE CLAIM OF DEFENDANT IN ERROR DOES NOT FALL WITHIN THE MEANING OF THE TERM "FRAUD" AS THERE USED. AND ON THIS POINT THE ENTIRE EVIDENCE IS PROPERLY BEFORE THE COURT ON THE PLEA PUIS AND THE REPLICATION THERETO.

Chitty on Pleadings, 246.
Clough v. *Shepherd*, 31 N. H., 490.
Teel v. *Fonda*, 4 John., 304.
Neal v. *Scroggs*, 95 U. S., 704.
Hennequin v. *Clews*, 111 U. S., 565.
Noble v. *Hammond*, 129 U. S., 68.
Upshur v. *Briscoe*, 138 U. S., 138.
Keime v. *Graff*, 14 Fed., Cas. No. 7650.
Bracken v. *Milner*, 104 Fed. Rep., 522.
Burnham v. *Pidcock*, 68 N. Y. Supp., 1009.
In re Benedict, 75 N. Y. Supp., 165.

In re Gaylord, 113 Fed. Rep., 131, 135.
Scott v. *Porter,* 39 Am. Rep., 726.
Watertown Carriage Co. v. *Hall,* 72 N. Y. Supp., 466.
Crosby v. *Miller,* 25 R. I., 172 (55 Atl., 328).
Western, etc., Co. v. *Hunt,* 116 Fed. Rep., 442.

IV.

THE CASE MADE BY DEFENDANT IN ERROR SHOWS THAT THERE WAS NO FRAUDULENT INTENT OR POSITIVE FRAUD ON THE PART OF PLAINTIFFS IN ERROR, AND THAT THE RELATIONS BETWEEN THE PARTIES WERE PURELY CONTRACTUAL AND THEREFORE NOT RESPONSIVE TO THE COUNTS EITHER FOR CONVERSION OR DECEIT.

Markham v. *Jourdain,* 41 N. Y., 239.
Wood v. *Hayes,* 15 Gray, 375.
In re Swift, 105 Fed. Rep., 493.
Coville v. *Loud,* 135 Mass., 41.
Weston v. *Jordan,* 168 Mass., 501.
Corbett v. *Underwood,* 83 Ill., 324.

V.

THE EVIDENCE SHOWS THAT THE TRANSACTIONS OUT OF WHICH THE CLAIM OF DEFENDANT IN ERROR ARISES WERE OF A GAMBLING CHARACTER AND ILLEGAL AND VOID AT COMMON LAW AND UNDER THE STATUTE. THE COURT MAY, AT ANY STAGE, WHEN IT APPEARS THAT THE MATTER INVOLVED IS FORBIDDEN BY PUBLIC POLICY, OR IS AGAINST PUBLIC MORALITY, DECLINE TO CONSIDER A CLAIM SO FOUNDED, REGARDLESS OF THE PLEADINGS.

Lyon v. *Culbertson,* 83 Ill., 38.
Soby v. *People,* 31 Ill. App., 242.
Cothran v. *Ellis,* 125 Ill., 506.

(2) *The clause "fraud," etc., used in subdivision four of section 17, is limited and restricted by the qualifying clause "while acting in a fiduciary capacity." There being no fiduciary relation between the parties, the debt is not within the exception, and hence is barred.*

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Noble v. *Hammond,* 129 U. S., 68.
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Keime v. *Graff,* 14 Fed., Cas. No. 7650.
Bracken v. *Milner,* 104 Fed. Rep., 522.
Burnham v. *Pidcock,* 68 N. Y. Supp., 1009.
In re Benedict, 75 N. Y. Supp., 165.

In re Gaylord, 113 Fed. Rep., 131, 135.
Scott v. *Porter,* 39 Am. Rep., 726.
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Lyon v. *Culbertson,* 83 Ill., 38.
Soby v. *People,* 31 Ill. App., 242.
Cothran v. *Ellis,* 125 Ill., 506.

Schneider v. *Turner*, 130 Ill., 39.
Jameson v. *Wallace*, 167 Ill., 396.
Oscanyon v. *Arms Co.*, 103 U. S., 261.
Martin Emerich Outfitting Co. v. *Siegel, Cooper & Co.*, 108 Ill. App., 364.

ARGUMENT.

The vital point in this case is the question of the effect of the discharge in bankruptcy of plaintiffs in error upon the debt or claim which the defendant in error seeks to recover in this action.

The action, in form, is founded upon the alleged acts of fraud by conversion or misrepresentation by plaintiffs in error occurring long prior to the filing of their petition in bankruptcy. The court below found conversion of plaintiff's "reversionary" interest in the stock and rendered judgment against the plaintiffs in error on that ground. This finding of the Circuit Court was not based upon the evidence in the case, but upon the pleadings, the court holding that the defendants, by filing their plea *puis darrein* continuance, confessed the allegations of the declaration (Abst., 241-242). This was error. The Court should have found on the issues raised by the plea *puis* and the plaintiff's replication thereto, and its findings should have been based on the evidence pertinent to those issues. This question will be discussed later in the brief.

The bankrupt law under discussion is the Act of 1898, now in force. The section chiefly involved is as follows:

> "Section 17. A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance with the name of the creditor if known to the bankrupt, un-

less such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

I.

The provable character of the claim of defendant in error is the first question to demand attention. Is his claim a "provable debt"?

The provisions of the Bankrupt Act bearing directly upon this question are as follows:

"Section 1. * * * (11) "Debt" shall include any debt, demand or claim provable in bankruptcy."

"Sec. 63. Debts which may be proved. (a) Debts of the bankrupt may be proved and allowed against his estate, which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt, who was, at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition, and up to the time of the entry of such judgments.

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Two views of paragraphs (a) and (b) and their relation to each other suggest themselves.

1st. That paragraph (a) classifies all claims that are provable, and paragraph (b) provides for the liquidation of such of them as are unliquidated at the date of the filing of the petition in bankruptcy.

2d. That paragraph (a) refers to claims of a contract character only, while paragraph (b) refers to, and includes, additional claims not necessarily of a contract character, but of whatever character, so long as the demand and the right of action thereon existed at the time of the filing of the petition.

Under either view, the demand of defendant in error is a "provable debt," because:

1st. "Debts of a bankrupt may be proved and allowed against his estate which are * * * (4) founded upon account or upon a contract express or implied." (P. (a), Sec. 63.) That is to say: if a claim "may" be proved—if it possesses a provable character or quality in any view—it is a "provable debt."

The demand of the defendant in error possesses that quality. It is of a quasi-contract character. He may waive the tort and recover for money had and received to his use on an implied contract. This is the law in cases of conversion.

T. W. & W. Ry. Co. v. *Clew,* 67 Ill., 383.
Elliott v. *Jackson,* 3 Wis., 649.
Sloat v. *Evans,* 35 Ill., 455.

It is obvious that the defendant in error can not, by his selection of a form of action, destroy, as against the bank-

rupt, and his right under the Bankrupt Act, the "provable" character of his demand. The question always is, does it possess inherently a provable character? Is there in it an "implied" contract?

In re Hirschman, 104 Fed. Rep., 69, is directly in point. The bankrupt in that case had obtained a stock of goods under false pretenses. A portion of them he had sold. Certain creditors repudiated the sales and recovered, respectively, the goods unsold in an action of replevin, and applied for an order under the provisions of paragraph (b) for the liquidation and proving up of their claims for balances. The court, upon making the order applied for, said:

> "Section 63 (a) does not authorize the proof of any claim arising *ex delicto,* unless recovery may be had in quasi-contract. Under Sub-section 4, claims founded upon a contract express or implied may be proved. The implied contract includes the fictitious contract implied in law—only treated as a contract for the sake of the remedy—and the true contract implied in fact. * * * If the goods were sold by the bankrupt the petitioners can treat the sales as made for them and maintain a claim for the consideration obtained by the bankrupt as money had and received to their use. This is said to be waiving the tort and suing on contract."

The following authorities are to the point, that the law is the same when money or goods have been obtained under false representations:

Western Assurance Co. v. *Towle,* 26 N. W., 106 (Wis.).

Graham v. *M. & St. P. Co.,* 10 N. W., 612 (Wis.).

Dashaney v. *Rogers,* 21 Pac. Rep., 742 (Cal.).

The case *In re Filer,* 125 Fed. Rep., 261, is a very strong case on this question and peculiarly applicable to the case at bar.

The question whether or not the claim of defendant in error is liquidated or unliquidated is unimportant. The necessity in some cases of first liquidating claims under the order of the court (paragraph b) detracts nothing from their provable character. Proceedings for liquidation under the act go to the question of practice and not to the provable character of the claims to be liquidated. A demand founded upon an express contract and for a breach of it may have to be first liquidated under the provision of this paragraph and yet it is none the less provable and entitled to share in dividends from the estate.

In re Silverman, 101 Fed. Rep., 219.

In re Beers v. *Hamlin,* 99 Fed. Rep., 695, the District Court of Oregon held that unliquidated damages for assault and battery could not be the basis for an involuntary petition in bankruptcy. This is obviously so. First, because such a petition must be based on claims aggregating $500. A claim for an assault or other malicious injury is, in its nature, so uncertain as not to be the basis of any proceeding, aside from one to determine its amount, and this may result in nominal damages merely, or none at all. Second, because until liquidated by judgment or under the provisions of the act such claim is not in provable shape. The act does not contemplate that claims of an unliquidated character, no matter what their nature, shall have recognition until its machinery has been fully set in motion; then the provision for the liquidation of such claims (paragraph b) takes hold and adjusts them so they may share in any dividends that may come.

In re Hilton, 104 Fed. Rep., 981.

The case *In re Brinkman,* 103 Fed. Rep., 65, is substantially the same in its facts as *Beers* v. *Hamlin,* and the decision is to the same effect.

The decision in both these cases would have been the same had the petition been based on an unliquidated claim for damages, for breach of an express contract; in which case it would hardly be contended that such a claim is not a "provable debt" for the purpose of sharing dividends.

2d. Under the other view of Section 63, referred to, claims for conversion, deceit and fraud, and claims resting wholly in tort, such as for trespass, personal injuries, damages to property, and even wilful injuries "may be proved and allowed," etc.—are "provable debts" so as to share in dividends, subject, of course, to liquidation in the manner there prescribed.

The language of the act is certainly broad enough to include any demand that may be liquidated and the amount definitely determined. "Unliquidated claims against the bankrupt," etc., ars terms that convey no hint of limitation. Collier, in his work on Bankruptcy, says (p. 344):

> "The language of paragraph b. itself seems to be broad enough and free enough from ambiguity to justify the conclusion that all unliquidated claims may be liquidated and proven and allowed, and there would seem to be no more reason for denying to a person injured by the tort of another a right to recover a pro rata payment upon the damages awarded to him than for denying to a contract creditor the dividend upon the debt due him, although there are ample reasons for refusing to release the tort feasor for the debt incurred by his tort."

In *Beers* v. *Hamlin, supra,* concerning a claim for damages for assault and battery, the court says:

> "A claim like this, arising out of a tort, must be reduced to judgment, or, pursuant to application to the court, be liquidated in such manner as the court

shall direct, in order to be proved against the bankrupt's estate."

The Bankrupt Act of 1867, by express terms, made claims for conversion, etc., provable. The act reads (paragraph 5067):

> "All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him, may be proved and allowed as debts," etc.

There is no apparent reason why Congress should provide for the allowance of such claims under one act and not under the other, especially when both acts provide a way for liquidating the amount of such claims.

Collier on Bankruptcy, 338.

The position that every claim, no matter what its character, provided that it exists before adjudication in bankruptcy, and the amount of it can be determined in the way pointed out "may be proved and allowed" is strengthened by the language of Sec. 1:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as," etc. And then follows a list of "debts"—"provable debts"—not released. The words "provable debts," by the terms of the act, are made to apply to the different classes of demands that follow immediately after these words. These classes cover demands of the character of the plaintiff's as asserted in this action.

This view is further warranted by the language of a like section in the act of 1867, which reads as follows:

> "Section 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a

public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

While the language of the two sections differs, the evident purpose is the same in each. In both, the excepted liabilities of the bankrupt are referred to as "debts." In one act they are mentioned as "provable debts," and in the other as "debts" that "may be proved." Where is the difference?

The test of provability of a demand is the legal right under the law of the claimant to prove it, liquidated or unliquidated, and share in the dividends of the estate against the objection of contesting creditors.

If it be conceded for the sake of argument that there are a class of claims not provable against such objection, as for example, claims arising out of the violation of a criminal statute, and the like, this is not such a claim. It seems too clear for argument both on principle and under the authorities, that defendant in error could have filed his claim in the bankruptcy proceedings in question had he chosen to do so, and that the same thereupon would have been allowed against any objection that creditors might have made.

II.

Assuming that the demand of the defendant in error is provable in bankruptcy, is it barred by the discharge of plaintiffs in error?

The only exceptions in Section 17 of the Bankrupt Act at all available to the defendant in error are found in Subdivisions 2 and 4.

It is too plain for argument that the defendant in error's

demand is not within the provisions of Subdivision 2, as it is not in judgment. This Mr. Burke frankly admitted at the trial.

If "fraud," etc., mentioned in Subdivision 2, must be merged in judgment in order to be available to the defendant in error, it seems quite clear that such judgment, in order to be within the exception, must have been entered before the bankrupt obtains his discharge, and, perhaps, before the commencement of the proceedings in bankruptcy, otherwise there would be no reason in limiting the exceptions to judgments on claims based on the wrongs mentioned in this subdivision, instead of extending it, in terms, to the claims themselves.

It follows that in order to recover as against the discharge the defendant in error must bring his demand within the provisions of Subdivision 4 and rely entirely upon the "fraud, embezzlement, misappropriation or defalcation" of plaintiffs in error while acting in a "fiduciary capacity."

Did the plaintiffs in error at any time during the course of the transactions out of which this controversy arose, sustain to the defendant in error a fiduciary relation or "character" or "capacity" within the meaning of this subdivision?

(1) Crawford & Valentine were stockbrokers or factors, dealing in various stocks on the Philadelphia Stock Exchange, through Philadelphia stockbrokers. Whatever stocks were "purchased," including the stock in question, remained with the eastern brokers as and for the purpose heretofore stated. Mr. Burke had long been a speculator in the stock market, and was perfectly familiar with markets, margins, commissions, etc., and also with the character of all the transactions in which he was engaged—the rules, customs and regulations governing the business generally.

He was perfectly familiar with his dealings in stocks, through the plaintiffs in error, and knew that the business was being conducted as it was, and according to the usual and customary manner.

Books of account were kept by plaintiffs in error wherein were entered in detail, in an account with defendant in error, their mutual transactions, showing credits for all moneys received from whatever source, and debits for all moneys paid out, etc. Detailed monthly statements of this account were regularly sent to the defendant in error.

Under the Bankrupt Act of 1841 it was held by the Supreme Court of the United States, in the case of *Chapman* v. *Forsyth*, 2 How., 202, and followed by a long line of authorities, that such a factor or broker did not sustain a fiduciary relation to his principal, and that his discharge in bankruptcy would bar a demand arising from failure to account for proceeds of property committed to his charge. It is the leading case on this question. The court below had, in a certified case, submitted the following question:

> "2. Is a commission merchant and factor who sells for others indebted in a fiduciary capacity within the act (1841) provided he withholds the money received for property sold on account of the owner, and the money received on owner's account?"

The part of the Act of 1841 involved, and corresponding to Section 17 of the present act, reads as follows:

> "All persons whatsoever residing in any state, territory, or district of the United States, owing debts which shall not have been created in consequence of the defalcation as a public officer or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, shall be entitled to a discharge," etc.

The Supreme Court in answering the question says:

> "The second point is, whether a factor who retains the money of his principal is a fiduciary debtor within the act.
>
> "If the act embraces such a debt it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of them is in a commercial sense a disregard of a trust. But this is not the relation spoken of in the first section of the act.
>
> "The cases enumerated, 'the defalcation of a public officer,' 'executor,' or 'trustee,' are not cases of implied but special trust and the other 'fiduciary capacity' mentioned must mean the same class of trusts. The law speaks of technical trusts and not those which the laws imply from the contract. A factor is not, therefore, within the act."

The same Court has held that the bankrupt acts of 1867 and 1841 are the same in this respect, and must receive the same construction. The corresponding part of the Act of 1867 reads as follows:

> "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act."

In *Neal* v. *Scroggs,* 95 U. S., 704, a case under the Act of 1867, the court quoted verbatim the above language of the opinion in *Chapman* v. *Forsyth,* reaffirming the decision and giving the same construction to the term "fiduciary capacity" as used in the Act of 1867.

In *Keine* v. *Graff*, 14 Fed. Cases, No. 7650, the defendants were commission merchants and as such sold cheese consigned to them by the plaintiff, and rendered an account of such sale. Plaintiff drew. The draft was not paid. Defendants obtained a discharge in bankruptcy. Was the debt barred by the discharge? The court holds that it was, and discusses at some length both of the foregoing decisions, and adopts the same construction of the term "fiduciary capacity," viz., that it refers to "technical trusts and *not to those the law implies from the contract.*" The opinion continues:

> "Now the default of the factor in not making payment to his principal is not a fraud within the meaning of the 33rd section of the Act of 1867, as is shown by *Neal* v. *Scroggs*, nor is the debt of a factor created by his defalcation 'while acting in a fiduciary character,' as the meaning of this phrase is explained in *Chapman* v. *Forsyth*, unless the phraseology of the Act of 1867 has changed the sense of this phrase as it stood in the Act of 1841. The main portions of the section are in the same words in both acts, and the mere verbal differences between them do not seem to me to change their substantial import. * * * If this view is correct, as I think it is, then *Chapman* v. *Forsyth* conclusively determines the meaning of the Act of 1867, and excludes from the operation of the section the debt sued for here."

In the case of *Hennequin* v. *Clews*, 111 U. S., 565, decided in 1883, the debtors, Henry Clews & Co., received from Hennequin & Co. twenty-nine Toledo R. R. mortgage bonds for $1,000 each, to be held as security for a line of credit opened on the London correspondents of Clews & Co., in favor of Hennequin & Co. Clews & Co. hypotheticated the bonds to raise funds for their own use. Subsequently

Clews & Co. failed, and the bonds were lost and consequently were not surrendered to Hennequin & Co., although the latter had not, at any time, failed to protect all their bills, and were not in any way indebted to Clews & Co. at the time of the failure. In an action brought by Hennequin & Co. to recover the bonds or their value Clews & Co. pleaded in bar a discharge in bankruptcy. The court again reviewed their former decisions, reaffirming them, and quoted the above language from the opinion in *Chapman* v. *Forsyth* as decisive, and holding that Clews & Co. were not acting in a fiduciary capacity in their relation to the bonds or to Hennequin & Co.

This case will be referred to again on another branch of the question.

In *Grover & Baker Co.* v. *Clinton,* 11 Fed. Cases, No. 5845, the defendant was a sewing-machine agent who was to sell on commission, collect and remit monthly. He was short on settlement $1,600; failed in business and obtained a discharge in bankruptcy. The court held (Dist. of Wis.) that the debt was released, and cited the above case as decisive.

Noble v. *Hammond,* 129 U. S., 68 (621), holds that a debt collected from another person and mixed with collector's own funds without fraudulent intent is not of a fiduciary character.

Upshur v. *Briscoe,* 138 U. S., 375, follows *Hennequin* v. *Clews* and *Chapman* v. *Forsyth,* and holds that an instrument, relied upon as creating a trust, created, in fact, the relation of debtor and creditor and that the subsequent loss of the fund was covered by the discharge in bankruptcy of the obligor.

The courts of the following states have followed *Chapman*

v. *Forsyth* in its construction of the term "fiduciary capacity":

Alabama—

In *Anstill* v. *Crawford,* 7 Ala., 340, holding a factor not to be a fiduciary agent.

Woolsey v. *Cach,* 54 Ala., 383 (25 Am. Rep., 712), holding that a debt of a cotton factor for proceeds of cotton of his principal sold is not of a "fiduciary character."

Arkansas—

In *Sanders* v. *Sanders,* 56 Ark., 588 (20 S. W. Rep., 518), holding to a like construction of the State Constitution by analogy.

Florida—

Chipley v. *Fierson,* 17 Fla., 642, holding that the debt of a commission merchant for proceeds held by him was not contracted in a fiduciary capacity within the meaning of the Bankrupt Act.

Georgia—

Georgia R. Co. v. *Cubbedge,* 75 Ga., 323, holding that when one is invested with the effects of another to sell and dispose of for the benefit of the latter, his failure to account does not create a fiduciary debt.

Indiana—

Dupont v. *Beck,* 81 Ind., 274, holding that the obligation of a factor is not of a "fiduciary character."

Maine—

Phillips v. *Russell,* 42 Me., 361, holding that one entrusted with money to take to a distant place to pay a note did not act in a "fiduciary capacity" but as a bailee merely.

Massachusetts—

Hyman v. *Powl,* 7 Met., 330, following factor cases.

Halpin v. *May*, 100 Mass., 499, holding that a deposit of money with a broker for purchase of stocks to be accounted for on demand does not create a fiduciary debt.

See, also, to the same effect:

Cronan v. *Cotting*, 104 Mass., 245.

Woodward v. *Towne*, 127 Mass., 42.

Mississippi—

Green v. *Chilton*, 57 Miss., 599 (34 Am. Rep., 483), holding that the debt of a collecting agent to a bank for misappropriation of proceeds of notes placed in his hands for collection is not of a fiduciary character.

New Jersey—

Gibson v. *Gorman*, 44 N. J. L., 327, holding that a deposit received by an auctioneer from a purchaser was not received in a "fiduciary character."

New York—

In addition to *Hennequin* v. *Clews*, 77 N. Y., see the following to the same effect:

Palmer v. *Hussy*, 87 N. Y., 308.

Lawrence v. *Harrington*, 122 N. Y., 408, holding that conversion is not fraud within the meaning of the act, and the expression "fiduciary character" does not include implied trusts.

Mulock v. *Byrns*, 129 N. Y., 25.

Ohio—

Bissell v. *Couchine*, 15 Ohio, 64, holding that one who receives money to pay to another on a note of the employer and refuses to do so does not hold the money in a "fiduciary character."

Pennsylvania—

Curtis v. *Waring*, 92 Pa. St., 109, holding to the above construction of the term "fiduciary relation."

Scott v. *Porter*, 93 Pa. St., 40.

Tennessee—

Pankey v. *Nolan,* 6 Humph., 155, holding that an agent who retains money of his principal is not a fiduciary debtor.

Vermont—

Hammond v. *Noble,* 57 Vt., 200, holds to same ruling as to "fiduciary trusts" as *Chapman* v. *Forsyth.*

Slayton v. *Wells,* 66 Vt., 63, holds that no fiduciary relation exists between consignor and commission agent.

Illinois—

Wilson v. *Kirby,* 88 Ill., 570, cites with approval the decision of *Chapman* v. *Forsyth,* and quotes that part of the decision in full construing the term "fiduciary character," as used in the Bankrupt Act, and applies this construction by analogy to the construction of the term "a trust for any purpose," as used in a state statute.

To the same effect, see:

Straw v. *Jurgens,* 144 Ill., 507.
Shepherd v. *Furness,* 153 Ill., 590.
Pierce v. *Shippee,* 90 Ill., 376.

The last edition of the Am. & Eng. Ency. of Law sums the whole matter up in the following language (Vol. 16, p. 781):

> "Implied Trusts. Though there are some decisions to the contrary, it is now well settled that implied trusts do not come within the statutory provision under consideration (fiduciary relation), therefore a discharge releases all debts incurred by persons while acting as ordinary agents, attorneys at law, bailees, pledgees, brokers, factors and commission merchants, or any case where mere trust or confidence is reposed in the debtor, in the popular sense of the term."

That the decisions referred to apply with equal force to the Act of 1898 as to the Acts of 1841 and 1867 seems too

clear for argument; but we are not left to conjecture or doubt, as the Federal Court for the Southern District of New York, *In re Basch*, 97 Fed. Rep., 761, has passed upon the precise question. The opinion refers to many of the foregoing cases as decisive, and to others in the same line. Brown, J., says:

> "Under the prior bankruptcy acts of 1841 and 1867, after conflicting adjudications in the courts below, it became definitely settled by the decisions of the Supreme Court that debts excepted from the effect of a discharge in bankruptcy on the ground that they were created by fraud or defalcation, or while acting in a fiduciary capacity, did not embrace debts arising in commercial dealings between principal and agent or factor for the sale of goods on commission. * * * The provisions of Section 17 (4) of the present Bankrupt Act as to the debts excepted from the operation of the discharge are so nearly identical with the language of the preceding acts that those provisions must be deemed to be used in the sense adjudicated by the above decisions, so as not to except a debt or claim for a technical conversion or sale on commission, like the claim of the present creditor."

A like decision was rendered in the U. S. Circuit Court, W. D., Missouri, in *Bracken* v. *Milner*, 104 Fed. Rep., 522. An examination of this case shows that the defendant was guilty of an intentional conversion of plaintiff's property in two capacities, one as an agent, and the other as a technical trustee. As to his conversion as an agent, his discharge was held to be a bar, but his conversion as a trustee was held to be within the exceptions of Subdivision 4, Sec. 17.

(2) But the defendant in error contends that the terms "fraud" and "embezzlement" as used in Subdivision 4 are not related to the words "officer" and "fiduciary capacity," but that they are to be construed as entirely distinct from

them, as much so, in fact, as if the latter terms were omitted and the terms "fraud," etc., stood alone; and that the character of his claim is such as to be within the legal meaning of the term "fraud" as construed by the authorities.

In reply we say that the terms "fraud," "embezzlement," "misappropriation," and "defalcation" are all related to the terms "officer" and "fiduciary capacity," one term as much as the other, and that the plain reading of this subdivision and its grammatical construction will admit of no other interpretation.

It is admitted that the terms "misappropriation" and "defalcation" are so related. What now is there in the punctuation or construction of the sentence to disassociate the other terms? The word "or" which precedes the word "defalcation" is not a term of separation, but is rather a conjunction, and if used between each of the other terms would not change the construction.

Referring back to Subdivision 2 we find the word "or" so used, and no one will question but that all the kindred terms of this subdivision are related to the word "judgment" and are not to be separated from it.

The defendant in error argues in this behalf that Subdivision 4 is substantially the same as the corresponding part of the Act of 1867, where "fraud" and "embezzlement" were rightly construed as not related to the terms "public officer" or "fiduciary capacity," but stood out separate and apart from them—independent of them.

Place the two acts side by side and a radical difference in this respect is quickly seen. Here they are:

Sub. 4, 1898: "Were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

Act of 1867: "That no debt created by fraud or em-

bezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity," etc.

"Fraud" and "embezzlement" in the Act of 1867 are seen at a glance to be used independently and apart from "officer" and "fiduciary capacity," and the term "defalcation" only to be related to the latter term. While under the Act of 1898 "fraud," "false pretenses," "false representations," "wilful and malicious injuries," "embezzlement," "misappropriation," and "defalcation" are *not* so separated and independent, but are related either to "judgments" in Subdivision 2 or "officer" or "fiduciary capacity" in Subdivision 4.

The decisions of the Federal Courts support our view of this question.

In *In re Rhutassel*, 96 Fed. Rep., 599, Judge Shiras said:

> "If the Bankrupt Act provided that claims created by fraud, false statements, or false pretenses were excepted from the bar of a discharge, then the mere fact that the claim had been put into judgment might not preclude the holder thereof from proving its original and essential nature, in order to enable the court to determine whether it came within the exceptions of the statute. *Wisconsin* v. *Eplican Ins. Co.*, 127 U. S., 265, 8 Sup. Ct., 1370. Thus, if the bankrupt, while acting in an official or fiduciary capacity" (note that the court uses these terms in relation, as we claim they should be), "misappropriated money coming into his hands, and a judgment for the amount misappropriated or embezzled had been renderd against him in an action for money had and received, the merger of a claim into a judgment of that form would not debar the owner of the claim from showing, as against a plea of a discharge under the Bankrupt Act, that the claim or debt now evidenced by the judgment was one created by the fraud, embezzlement, misappropriation, or defalcation

of the bankrupt while acting in an official or fiduciary capacity, because the last clause of Section 17 of the act excepts from the operation of a discharge provable debts created by the fraud, misappropriation or embezzlement of one acting in an official or fiduciary capacity." (Note the relation of the terms again.) "The point of inquiry under this clause of the act is, how was the debt created, not in what form is it now evidenced? Under the second clause of Section 17, the question of the form of the debt as well as of its original nature, is an essential in determining whether the particular debt will be barred by a discharge, or whether it is protected against the bar of the discharge, by coming within the exceptions created by this clause of the section. The second clause of this section does not except out from the effect of discharge claims created by fraud, or by obtaining property by false statements, or by wilful and malicious injuries to the person or property of another, but does except out judgments rendered upon causes of action of the named nature; and, therefore, to come within the exception it must appear that the creditor holds a judgment, which was rendered in an action for fraud. * * * It is apparent that if it had been enacted that a discharge should not bar claims or debts created by false pretenses or false statements, such a provision would have been a fruitful source of litigation in the future, and would have subjected the bankrupt to constant worry and pressure from creditors claiming that the debts due them had in fact been created by false statements with respect to the financial condition of the debtor, and were, therefore, not within the bar of the discharge; and hence the wisdom of the provision that limits the exception to judgments which show on their face that the claim merged therein was based on the fraud of the bankrupt."

In *In re Hirschman*, 104 Fed. Rep., 69, Judge Marshall says:

"Section 17 of the Act prescribes the provable debts which are not released by a discharge in bankruptcy. Among such debts judgments in action for certain torts are mentioned; but no cause of action for a tort not reduced to judgment is excepted."

In the case of *In re Lewinsohn*, 99 Fed. Rep., 74, the bankrupt applied to the Federal Court for an order staying proceedings in a state court on certain warrants that had been issued for his arrest. In the decision of the matter before him, Judge Brown suggests both constructions now under discussion, and says:

"Paragraph 4 may be regarded as merely a substitute for Section 5117, Rev. St., and thus applicable to frauds generally; and Subdivision 2 as respects frauds to be designed merely to remove the doubts which arose under the Act of 1867. Whether a judgment for such frauds by merger of the original debt did not make the discharge operative upon it."

Which is the view of the defendant in error.

"On the other hand, Subdivision 2 might be construed as requiring for all frauds other than official or fiduciary ones, judgments should be obtained in order to prevent their being barred."

This is the view of plaintiffs in error.

He does not adopt either view, but enters an order (p. 76) finding, among other things, that

"Upon the bankrupt's giving a bond to that effect, with approved security, the stay should be continued for a period not exceeding twelve months from the date of adjudication, unless an application for discharge be then pending, and in that case until the final determination of that application."

This is the customary form of the order entered under Sec. 11 of the Act of 1898. This section reads as follows:

> "Sec. 11. Suits by and against bankrupts. (a) A suit which is founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudicated a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then, until the question of such discharge is determined."

It appears that an order of stay was granted by the Federal Court in the case at bar. Inferentially it must have been granted upon the theory that the demand of the defendant in error is one "from which a discharge would be a release."

In *Hargadine-M'Kittrick Dry Goods Co.* v. *Hudson,* 111 Fed., 361, the court, after quoting the corresponding sections of the Acts of 1867 and 1898, says:

> "The difference in language is striking. Under the old law, no debt created by fraud or embezzlement of the bankrupt was discharged by proceedings in bankruptcy, but in the present act it is 'judgments in actions for fraud or obtaining property by false pretenses or false representations, or for wilful or malicious injuries to the person and property of another' which are not released by discharge in bankruptcy."

In *Morse & Rogers* v. *Kauffman,* 40 S. E., 916 (Va.), the declaration charged the defendants with procuring goods under false pretenses, false representations, etc. The defendant set up a discharge in bankruptcy. The plaintiff demurred on the ground that the action was in tort, and

the claim not barred by the statute. The Supreme Court of Virginia, in passing upon the question, says:

"This case involves the consideration of paragraphs 2 and 4 of Section 17 of the Bankrupt Act of '98. * * But the provisions of the Act of 1898 are essentially different from those of the act of 1867 in respect to debts which are not to be affected by discharge in bankruptcy. The subdivisions of Section 17 of the act, bearing upon the question under consideration, are as follows: (Quoting second and fourth subdivisions.)

"It will be observed that the first part of Section 33 of the Act of 1867, in relation to debts created by fraud, is carried into paragraph 2 of Section 17, *supra*, with the qualification that there must be a judgment in actions for frauds, while the latter part of Section 33, in respect to fiduciary debts, is incorporated in paragraph 4.

"Plaintiff's claim is not within the exception of paragraph 2, because no judgment had been obtained upon it in an action for fraud. The manner in which the demand is evidenced, as well as its original nature, is an essential ingredient in determining whether or not the particular debt will be barred by a discharge.

"Subdivision 2 does not except from the operation of a discharge claims created by fraud, or by obtaining property by false statements or by wilful and malicious injury to the person or property of another, but judgments recovered in actions for fraud on claims arising out of those conditions.

"By the plain language of the paragraph, the demand will be barred by a discharge in bankruptcy, unless reduced to judgment, and unless the judgment, read in connection with the pleadings in the case, shows that it was recovered in an action for fraud, or obtaining property by false pretenses or false representations, or wilful and malicious injuries to the person or property of another. This construction was placed upon the enactment by the District Court of the United States for

the Northern District of Iowa, in a well-considered opinion. *In re Rhutassel,* 2 Am. Bankr. R., 697, 96 Fed., 597.

"In that case the wisdom of the limitation is commended as a protection to bankrupts against constant worry and pressure from creditors claiming that debts due them had been created by false statements with respect to the financial condition of the debtor."

In *Gee* v. *Gee,* 87 N. W., 1116, the court says:

"As distinguished from the previous United States Bankruptcy Acts, the Act of 1898 provides for two separate classes of exceptions from the discharge of the bankrupt, viz., one in which judgment must be for fraud, and the other in which the debt must have arisen upon embezzlement, misappropriation or fraud in a fiduciary capacity. It is probable, as held in *In re Rhutassel,* 96 Fed., 587, that it was the purpose of the present Bankrupt Act to provide that, in the first class of cases, the fraud should be shown or evidenced by a judgment, or at least disclosed in judgment roll, while in the case of debts through fraud in a fiduciary capacity, proof of the fiduciary capacity would furnish test of the exception which would apply to cases of violation of express trusts."

In *In re Bullis,* 73 N. Y. Sup., 1048, the Appellate Division of the Supreme Court of New York, in the course of its opinion, uses the following language:

"The counsel for the respondent devotes much space in his brief to an argument that subdivision 4 of Section 17, applies to this appeal. The position is that the terms 'fraud,' 'embezzlement,' 'misappropriation,' in that subdivision, relate to an individual, while the word 'defalcation' alone applies to one 'acting as an officer or in a fiduciary capacity.' We cannot assent to that construction. In the corresponding section (33) of the Act of 1867, the interpretation contended for may have been tenable. In the present section, however, the ex-

ceptions have been remodeled and reclassified, and the intention apparently was to make subdivision 2 applicable to frauds, etc., perpetrated by an individual failing debtor, but protected him by limiting the prohibition against his discharge to frauds, false representations, etc., embodied in a judgment and provable by the record. Subdivision 4 was then designed to relate to an officer, or one acting in a trust capacity, and was enlarged in its scope by erecting a barrier to the discharge of such a culpable debtor, who had been guilty of 'fraud, embezzlement, misappropriation,' as well as 'defalcation.' A person faithless in a public or trust capacity, is the more flagrant malefactor, and hence it may have been deemed advisable to extend the barrier to his receiving the benefit of a discharge permitted by the statute to include the other delinquents named. The natural rendition of subdivision 4, as well as its grammatical construction, seems to favor this interpretation. If any debt created by fraud, embezzlement or misappropriation is to be excepted from the application of the statute, then there is no necessity for subdivision 2, making a judgment essential to prevent the granting of the discharge under the statute. The bare proving the debt was created by fraud would be sufficient to raise a bar to the release of the insolvent therefrom, which would be tantamount to emasculating subdivision 2."

In *Harrison et al.* v. *Herman,* 72 S. W., 546, the Supreme Court of Missouri says that:

> "The provision of the Bankrupt Act of 1898 must be construed to mean what it says—that it is *judgments* in actions for fraud, and *not debts* created by fraud, as in the Act of 1867, which are not to be affected by the discharge in bankruptcy."

The Supreme Court of New Jersey in *J. C. Smith & Wallace Co.* v. *Lambert,* 55 Atl., 88, says:

"We think, however, that under Section 17 of the Bankrupt Law to which reference has been made, there is no provision that would except from the discharge the *debt* upon which the present suit is brought. Clause 2 would not include it, for the reason that it applies to *judgments* alone and not to simple contract debts. Clause 3 (4) will not include it for there the debts excepted are such as were created by the fraud, etc., of the bankrupt *while acting as an officer or in any fiduciary capacity.*"

The defendant in error urges that no such construction should be given to this act as will destroy a creditor's remedy when his property rights have been invaded. It must be remembered, however, that bankrupt laws always work ruthless destruction of creditors' rights and remedies. Such laws are never passed in the interest of the creditor class, but wholly in the interest of the debtor class. The only benefit to the creditor class, if any, comes through the administration of the bankrupt's estate, if there be one. But whether there be one or not, the debtor may have the full benefit of the law.

The legislative purpose in enacting a bankrupt law is to serve the public good, by reinstating to usefulness in the family and in the social and business world a debtor so burdened with debts and obligations that his reinstatement would otherwise be impossible, and courts have always construed these laws liberally in that behalf.

Mr. Justice Hunt, in *Allen* v. *Ferguson*, 85 U. S., 1, uses the following pertinent language:

"The law holds it to be right that a debtor shall devote his entire property to the payment of his debts, and when he has done this that after-acquired property shall be his own, to be held free from the obligation of all his debts, just debts as well as unjust, principal

debts as well as security debts. Neither the Supreme Will, so far as we can ascertain it, nor the laws of the land, require that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family; that he should appropriate his earnings to the payment of a debt from which the judgment of the law has released him rather than to the support of his family or to his own comfort."

III.

Assuming for the purposes of the case that the term "fraud" as used in Subdivision 4 of Section 17, is not limited and confined to the fraud of an officer or of one acting in a fiduciary relation, but is to be construed as separate and distinct from the language that follows it in that subdivision, then it must be made to appear, of course, that the claim of the defendant in error is of such a character as to fall within the meaning of the term "fraud" as there used. The term "fraud" as used in the several bankrupt acts has been construed by all the authorities to mean an active express fraud, and not one implied from an unjustifiable or illegal act. A positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not mere fraud in law—a technical or constructive fraud—which may exist without the imputation of bad faith or immorality.

It is only under the extravagant allegations of the declaration that the defendant in error can, or does, claim that his demand falls within the terms of the legal definition of "fraud" as used in the act; that by their plea of *puis darrein continuance*, setting up their discharge, the plaintiffs in error have admitted such allegations to be true in all their extravagance; that the court, in arriving at its judgment, must disregard the evidence, although introduced by the de-

fendant in error himself—evidence, too, which is descriptive of the character of his claim. In other words, the defendant in error insists that a court sitting to administer justice according to law and fact must in the presence of the solemnly attested truth, formally admitted into the case by the court, and the positive act of both parties, disregard the evidence of such attested truth and base its decree upon a palpable falsehood, contained in an unsworn declaration, in order to satisfy the technical requirements of an antiquated feature of the machinery of practice.

However, the evidence is properly before the court on the issues raised by the plea *puis* of plaintiffs in error, and the replication thereto. These issues necessarily involve the real character of the demand of defendant in error. Upon such an issue the court must know the real character of the demand in question in order to determine whether or not it falls within any of the exceptions of Section 17.

And in refusing to consider and pass upon the evidence the trial court committed serious error to the prejudice of the plaintiffs in error.

The plea *puis* alleges, among other things (Abst., 31-32):

> "That the several supposed causes of action in the said declaration, and in each count thereof mentioned, are in respect of debts and claims, and each of them is in respect of a debt or claim made provable by said acts of Congress relating to bankruptcy against the estate of the said defendant (Richard C. Crawford, Edward A. Valentine), and the same were provable against his (their) estate, both individually and copartnership as aforesaid; that the said supposed causes of action are not, nor is any one of them, in respect of any such debts or debt as are or is by the said acts excepted from the operation of a discharge in bankruptcy."

The plaintiff's replication to the plea alleges (Abst., 33):

> "That the several causes of action in the declaration mentioned and the cause of action in each count thereof mentioned, are not, and is not in respect of debts or claims, nor is any or either of them in respect of a debt or claim, made provable by the acts of Congress relating to bankruptcy, etc. * * *; and the plaintiff says that said causes of action and each of them is, in respect of such debts, claims, demands or damages as are, or is, by the said acts of Congress excepted from the operation of a discharge in bankruptcy, and are not causes of action, nor is any or either of them a cause of action, in respect of any such debt, claims, demands or damages as are not by the said acts of Congress excepted from the operation of a discharge," etc.

Here are presented distinct issues of fact to be tried and determined upon evidence. The origin and character of the claim of defendant in error is thus brought in question as a fact. That the evidence admissible under the plea *puis* and the replication is the same as it would have been under the declaration and a plea of general issue is a mere coincidence, and does not, or should not, destroy the right of plaintiffs in error to try the issues as made in the case. That there were issues of fact to be tried was the view of defendant in error at the outset, and he assumed the burden of proof upon such issues by introducing a mass of testimony as to the origin and character of his claim. He should not now be permitted to withdraw all such evidence from the consideration of the court to the manifest prejudice of the plaintiffs in error; nor should the court have rejected it in arriving at its decision, nor should the court have refused to admit evidence on such issues offered by the plaintiffs in error.

Then, too, the evidence is admissible and must be considered under the well-known rule of pleading that when a pleader asserts a right based upon a statute containing an exception he must allege and prove that he is not within such exception.

Chitty says (Chitty on Pleadings, 246):

> "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption. * * * And Lord Tenterden said, 'if an act of parliament, or a private instrument, contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception, and if he state it as containing an absolute, unconditional stipulation, without noticing the exception, it will be a variance,'" etc.
>
> *Clough* v. *Shepherd*, 31 N. H., 490.
> *Teel* v. *Fonda*, 4 John., 304.

Here the law on which the plea is based reads as follows:

> "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such," etc.

The court is reminded, too, in this connection, that the evidence is without conflict. No fact testified to is disputed.

From the evidence it appears in brief that the defendant in error was never the owner in fact of any specified shares of stock, whether of Metropolitan Traction or of other kinds; that he never had any such stock in his actual possession or

under his control; that the Philadelphia brokers, through whom all the stock was "purchased," paid for it and held it on account of plaintiffs in error, and not on account of Mr. Burke, the latter not being known in the transaction; that the stock was so held by the Philadelphia brokers as collateral to the indebtedness of plaintiffs in error to them, all to the knowledge of defendant in error; that throughout the entire time of Mr. Burke's stock speculations, through the plaintiffs in error and their predecessors, and of all the many kinds of stock he pretended to purchase through them, he never had in his actual possession, nor was he able to identify as his, a single share; that while the book or apparent value of his stock transactions amounted to hundreds of thousands of dollars, his actual payments on the same, or investments in that behalf, were relatively trifling; that he never asked the delivery to himself of any share of stock directly or indirectly until after he learned of the failure of the plaintiffs in error; that books of account were kept between the parties wherein entries were made of all stocks bought and sold, of "margins" paid, and of losses sustained and profits made, from which monthly balances were struck and monthly statements rendered, indicating in the clearest manner that the relation of debtor and creditor existed between them, and that such was the understanding; that the relations of the parties and the manner in which their mutual transactions were carried on from first to last indicate in the strongest possible way that Mr. Burke never intended or expected to actually pay for or receive any stock through Crawford & Valentine, nor Crawford & Valentine to actually deliver to him any such stock, but that by tacit agreement all settlements between them, touching these stock transactions, should be made on the basis of market differences.

If under these circumstances the plaintiffs in error are

guilty of "fraud" by converting the property of defendant in error, such "fraud" is one of law rather than of fact, and does not involve that moral turpitude which the courts say must exist to bring their act within the exceptions of Section 17.

In *Neal* v. *Scroggs* (Clark), 95 U. S., 704, the defendant was held guilty of constructive fraud in purchasing bonds at a discount from the executor of an estate. His discharge in bankruptcy was held to be a bar in an action to recover, because such fraud did not involve moral turpitude, etc.

Judge Harlan, writing the opinion of the court, after discussing the questions as to whether or not a fiduciary relation existed and holding that it did not, says:

> "Applying these rules to this case, we remark that in the section of the Law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusions that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

The facts in *Hennequin* v. *Clews*, 111 U. S., 565, have already been alluded to. The bonds there in question were the property of Hennequin & Co., and came from their actual possession when deposited with Clews & Co., as collateral

security for Hennequin & Co.'s contingent liability. Clews & Co., while the bonds were so in their possession, and without the knowledge or consent of Hennequin & Co., appropriated them to a totally different use, viz., to secure an actual indebtedness of their own to others with whom Hennequin & Co. had no connection. The bonds were lost to Hennequin & Co. through this act. That the facts in *Hennequin* v. *Clews* make a far stronger case of fraud within the meaning of the act than do the facts in the case at bar, is too evident for argument.

Justice Bradley, writing the opinion of the court, says:

> "We have to decide the question whether the Act of 1867 operates to discharge the bankrupt from a debtor obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed, or whether a debt or obligation thus incurred is within the meaning of the 33rd section of said Act, which declares that 'no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act.' The New York courts decided that the effect of the discharge in bankruptcy was to discharge the debt, holding that the debt was not created by fraud nor by embezzlement, nor whilst the bankrupt was acting in a fiduciary character."

After discussing and approving the rule as to "fiduciary capacity" laid down in *Chapman* v. *Forsyth* and the rule laid down in *Neal* v. *Scroggs*, defining the term "fraud," the opinion continues:

> "The present case is not precisely like either that of *Chapman* v. *Forsyth*, or *Neal* v. *Scroggs* (Clark), but it is very difficult to distinguish it in principle from

the cases of commission merchants and factors failing to account for the proceeds of property committed to them for sale. There is no more, there is not so much of the character of trustee in one who holds collateral securities for a debt as in one who receives money for the sale of his principal's property—money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return when its purpose as security is fulfilled, but if he fails to do so it is only a breach of contract and not a breach of trust."

In the case at bar the stock to which the defendant in error makes claim was all the time in the possession of the Philadelphia brokers as collateral to Crawford & Valentine's indebtedness, with the knowledge and approval of Mr. Burke, and pursuant to the manner in which the business was being done.

In *Noble* v. *Hammond*, 129 U. S., 68, the debtor, a produce dealer, collected money for the accommodation of the plaintiff to keep until called for and deposited the same in bank to his own credit and with his own funds. He failed before it was called for, obtained his discharge in bankruptcy, and pleaded the discharge in bar of plaintiff's action to recover on the ground of fraudulent conversion.

The court reviews with approval the cases of *Neal* v. *Scroggs*, *Wolf* v. *Stix*, and *Hennequin* v. *Clews*. Justice Lamar in the opinion says:

"The finding of the jury that the agreement of the plaintiff in error was to collect the money and keep it until the defendant in error called for it, can not be taken to imply an obligation to keep and deliver to them the identical bills or coins, * * * nor can the sub-

sequent mingling by the plaintiff in error of the money collected with his own constitute the actual, positive fraud contemplated by that Act, but only such an implied fraud as is involved in most or all cases of conversion of property or of breach of contract."

In *Upshur* v. *Briscoe*, 138 U. S., 138, the defendant was an attorney appointed by a written instrument to receive moneys for the benefit of another, and to pay over to such other the interest from year to year during her life, and at her death to pay the principal to her legal heirs. He failed to pay over the principal and a portion of the interest, was adjudged a bankrupt, obtained his discharge, and pleaded it in bar of an action in tort brought by those entitled to the principal. The court in its opinion reviews the authorities and holds that the defendant did not sustain the relation of trustee—was not acting in a fiduciary capacity—that the relation created "was merely the usual one of contract between debtor and creditor," and that he was not guilty of "fraud" within the meaning of the Act.

In *Keime* v. *Graff*, 14 Fed. Cas. No. 7650, the defendants were commission brokers to whom the plaintiff had conveyed cheese to be sold on commission. The cheese was sold and an account of sale rendered. Plaintiff was authorized to draw, which he did, but draft was dishonored. Defendants failed, obtained a discharge in bankruptcy, which was held to be a bar to plaintiff's action. The court says:

> "Now the default of a factor in not making payment to his principal is not a fraud within the meaning of the thirty-third section of the Act of 1867, as shown by *Neal* v. *Scroggs*," etc.

In *Bracken* v. *Milner*, 104 Fed. Rep., 522, a decision under the Act now in force, the plaintiffs made arrangements with the defendant to loan money for them, secured by mort-

gages or deeds of trust—the notes and securities to be sent to the plaintiffs. The defendant was to look after the securities, make collections and remit promptly. The transactions following this arrrangement covered a long space of time and became unsatisfactory to the plaintiff, who upon investigation found that the defendant had collected his moneys and appropriated the same to his own use. It appeared that in some instances he had caused the deeds of trust, taken as security, to be executed to himself, and had subsequently collected the principal and converted the money so collected. In some instances he had collected interest, as stated, on other securities, and converted the same. The court in rendering its decision says:

> "The conduct of the defendant in respect of his stewardship is so reprehensible that at the hearing of this case the inclination of my mind was to hold him liable on all of these claims, but an examination of the rulings of the Supreme Court on kindred statutes has unsettled these first impressions. * * * He was simply under contract obligation to remit as fast as collected. The defendant did not misapply the money sent him. He loaned it on approved securities. His default arose on failure to remit, as a mere agent, in some of the cases sued on. The court, therefore, holds that in respect of the collections made by the defendant independently of his trusteeship in the deed of trust, and in the absence of positive fraud his liability therefor is relieved by his discharge in bankruptcy. A different question arises in the instances where the defendant was trustee in some of the deeds of trust, which he of his own motion foreclosed, and appropriated the money arising from the sales. * * * He had himself made trustee in certain of the deeds of trust, and thereby accepted the office. As such he was trustee of an express trust, and was therefore acting under a technical trust created by an instrument of writing. * * * He received

the money under the foreclosure only as a technical trustee, and was bound by his office as such to pay *over to the cestui que trust.* * * * In other words, he received such money while acting in the strictest sense in a "fiduciary capacity." His liability, therefore, in these causes of action is not relieved by his discharge in bankruptcy."

In *Burnham* v. *Pidock,* 68 N. Y. Supp., 1009, a case under the present Act, the court says:

"This action is brought for the conversion of goods. It is not essentially an action for fraud, and the cause of action does not necessarily depend upon any positive fraud, but it only requires proof of an improper interference with the property of another; and although fraud may incidentally be at the foundation of that interference, yet the judgment is one of conversion, and can not be said to be one of fraud. It is quite true in this particular case the learned court in New Jersey, in determining the motion for a new trial, *said that the act of the defendant which made him liable for the conversion was fraudulent; but that statement does not change the nature of the record,* nor can the opinion of the court be taken as proof that fraud necessarily lay at the foundation of the action, even if that could be established outside of the record, which we do not think. The fraud which will prevent the operation of the discharge in bankruptcy must be, as said in the case of *Hennequin* v. *Clews, 'positive fraud or fraud in fact, involving moral turpitude or intentional wrong,'* and it is necessary that that fraud should be the essential part of the cause of action without the proof of which the plaintiff can not recover. There was no such fraud in this case, and therefore the judgment of the learned court below was correct and must be affirmed."

In *In re Benedict,* 75 N. Y. Supp., 165, the action was one for conversion of money by the defendant received by

him as sales agent for the plaintiff. The court after quoting Section 17 of the pending Bankrupt Act, says:

"This section of the bankrupt law has been recently construed by the appellate division for the First Department in *Burnham* v. *Pidock*, 58 App. Div., 273, 68 N. Y. Sup., 107, in which it was held that a judgment obtained in an action for the conversion of goods was one discharged in bankruptcy, and not within the exception of the Act. *In re Basch* (D. C.), 97 Fed., 761, Brown, district judge, construed the exception not to include a claim against a merchant who failed to account for the value of goods consigned to him for sale on commission, on a contract to return the goods or their specific proceeds, and held that such a claim could not be said to be created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, and hence was released by the bankrupt's discharge. In *Bracken* v. *Milner*, 5 Am. Bankr. Rep., 23, 104 Fed., 522, in an exhaustive review of the authorities, Phillips, district judge, decides that the debts referred to in Section 17, Subdivision 4, above quoted, are those arising in the administration of a technical trust, and do not include a debt by reason of the failure of a bankrupt to remit money collected by virtue of a mere contract of agency to collect and pay over to his principals money loaned by him for them. In *Knott* v. *Putman*, 6 Am. Bankr. R., 80, 107, it is held that a debt arising from nonpayment by a cotton broker of proceeds from cotton purchased and sold by the bankrupt is dischargeable, and not within the exception. The theory of the above decisions is that, although conversion may be an implied fraud, yet the term "fraud" as used in the bankrupt law means a positive fraud—a fraud in fact—which is the gravaman of the action, and not implied fraud, or fraud in law, and that the term 'fiduciary capacity' used by the statute refers to technical trusts, and not those which the law implies from contract.

These decisions are based not only upon the strict language of the Bankrupt Act, but upon the holdings of the courts under the former bankrupt law. The provision of that law was, as to exception from discharge, as follows:

"'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged by proceedings in bankruptcy.'

"Under the above provision it was held in *Mulock* v. *Byrnes,* 129 N. Y., 23, 29 N. S., 244, that a judgment recovered on an indebtedness incurred by failure to pay over rents collected by the bankrupt as agent, was barred by his discharge in bankruptcy."

"In the present case the bankrupt did not * * * come into possession of the goods of the plaintiff by fraud or false representations. They were consigned to him, and his possession was a lawful one. By his contract with the plaintiff it became his duty to account for the proceeds of sales made by him. He failed to do this and converted the money to his own use. It would seem under the authority of the above cases, that the judgment was one which was dischargeable by bankruptcy proceedings. Under both theories, therefore, that the debt is one dischargeable by bankruptcy proceedings, and that, if it is not, it has no preference over other debts—the motion must be granted."

In *In re Gaylord,* 113 Fed., 131, 135, the bankrupts were stock brokers, as in this case. The court says:

"The definition of a provable debt (Section 63 of the Act of 1898, *supra*) seems also to satisfactorily determine that the obligation of the bankrupts to Gilbert is a debt within the meaning of the act. It is undoubtedly founded upon an open account, and likewise creates an implied promise or contract on the part of the bankrupts to pay any balance appearing thereby to be due to Gilbert. According to the definition aforesaid, an

obligation 'founded upon an open account, or upon a contract, express or implied,' is a provable debt under the bankruptcy act. There is no showing that the bankrupts kept Gilbert's money by itself. On the contrary, it sufficiently appears that the same was intermingled with that of other customers as well as that of the bankrupts themselves. The parties permitted the account to run for months in such a way as to clearly indicate their purpose to establish the relation of debtor and creditor between themselves."

In *Crosby* v. *Miller, Von & Co.*, 25 R. I., 172 (S. C. 55, Atl. 328), the plaintiff had obtained judgment against the defendants for the conversion of certain securities placed in their hands by her, and the defendants having been discharged in bankruptcy moved a stay of execution on the judgment. The court first discusses the relation between the parties and concludes it was not of a fiduciary character, citing many authorities already referred to in this brief, and then says:

"An action of trover and conversions is not an action for fraud. *Watertown Carriage Co.* v. *Hall*, 7 Am. Bankr. R., 716, 72 N. Y. Supp., 466; Collier on Bankruptcy, 178; *Burnham* v. *Pidock*, 5 Am. Bankr. R., 42, 66 N. Y. Supp., 806, affirmed on appeal, 5 Am. Bankr. R., 590, 68 N. Y. Supp., 1007. See, also, *In re Bullis*, 7 Am. Bankr. R., 238, 73 N. Y. Supp., 1047. The word 'fraud,' in the meaning of the Bankruptcy Act of 1867, means positive, or fraud in fact, involving moral turpitude or intentional wrong; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal* v. *Clark*, 95 U. S., 704, 24 L. Ed., 586. In *Hennequin* v. *Clews* the court held that a broker who failed to return stocks pledged to him as collateral security did not commit fraud in the meaning of the law. *The word has the same meaning in the Act of* 1898. *In re Blumberg*

(D. C.), 94 Fed., 476; *In re Rhulaessel* (D. C.), 96 Fed., 597; *Western Union Cold Storage Co.* v. *Hurd* (C. C.), 116 Fed., 422. The discharge in bankruptcy therefore operates to cancel this judgment, and the execution must be perpetually stayed."

The plaintiffs in error, through their Philadelphia brokers, were in the *lawful* possession of the stock in question at the time they are alleged to have *unlawfully* converted the same. Under such circumstances an act of conversion is not an act of "fraud" within the meaning of the Bankrupt Act.

This is inferentially held in nearly all the cases just referred to, and directly held in

Hennequin v. *Clews*, 111 U. S., 565.

Burnham v. *Pidock*, 66 N. Y. Supp., 806 (s. c. Appellate Branch 68 do, 1007).

Watertown Carriage Co. v. *Hall*, 72 N. Y. Supp., 466.

Crosby v. *Miller*, 25 R. I., 172 (s. c. 55 Atl., 328).

Western, etc., Co. v. *Hurd*, 116 Fed., 442.

In *Burnham* v. *Pidock* (66 N. Y. Supp., 806), the court says:

"If there are no wrongful *taking*, but a subsequent conversion, it was of necessity "wrongful," because it was illegal, but it was *not* necessarily fraudulent. * * * Following the decisions of the Federal Courts it must be held that the judgment sued upon though founded on 'wrongful conversion' is *not* necessarily one rendered in action either for fraud or for wilful and malicious injuries to the person or property of another, within the meaning of the Act."

In *Crosby* v. *Miller*, the Supreme Court of Rhode Island says:

"An action of trover and conversion is *not* an action for fraud" within the meaning of the Bankrupt Act.

IV.

The relation betwen the parties to this action during the time of their mutual dealings was purely contractual, and the utmost that defendant in error can claim, under such contract relation, is that the plaintiffs in error assumed an obligation of "carrying" for his benefit an investment for profit in a defined quantity of a certain stock, but no particular shares, and at some future or indefinite time to cause to be delivered to him certain certificates of such stock, when paid for by him, or in lieu thereof to account to him for the profits of his investment, to be determined by the market prices after the customary manner of the business with which all parties were well acquainted; and the defendant in error as a part of his contract obligation was to "margin" the stock after the manner of the trade, and as the markets demanded from time to time, to protect the plaintiffs in error against loss from a falling market, and to pay the plaintiffs in error a small commission for their services. The defendant in error kept his part of the bargain and the plaintiffs in error did not, but failed and sought the benefit of the bankrupt law. Hence this lawsuit. Hence this *form* of action.

Let us consider for a moment the question of the form of action.

It is true that there is a class of cases in which, although the action arises from the breach of a contract, the plaintiff has the choice of an action in tort or an action *ex contractu;* but in that class of cases the present one we contend does not belong. That class of cases includes only those in which the law imposes certain obligations upon the defendant really independent of the contract, but existing by virtue of his entering into the contract; the most familiar example of such a case being in the matter of common carriers. The

plaintiff has always endeavored to bring his relations with the defendants within this class of cases. The relation, he says, which the defendants sustained towards the plaintiff, was that of brokers and pledgees, and in one of his briefs, heretofore filed in the Circuit Court in this controversy, he says that "as such the law imposed upon them certain duties and obligations which they were required to perform," and that the question was, "did they perform the duties and obligations so imposed?" Mr. Burke's statement is not correct. That the defendants entered into a contract with Mr. Burke is perfectly true. That in consequence of their unfortunate business experience and insolvency they defaulted upon their contract, is also perfectly true. That this was unfortunate for Mr. Burke, and that his feeling of grievance caused thereby is natural, is also true; but all that gives him no right to recover in an action of tort, nor does it establish the fact that there has been a violation of a trust. The question is not even whether or not the defendants in every respect managed their business in accordance with the most approved methods of brokers, nor whether they speculated recklessly, nor whether they had insufficient capital. Our clients steadfastly maintain that all their transactions were such as were known and approved as "regular in the trade"; but the contrary might be admitted, and yet the only remedy for the plaintiff below might be an action in assumpsit for breach of contract. Every breach of every contract may be said to be wrongful. At all events, contracts entirely justifiably made and rendered impossible of execution by sheer misfortune and without any fault whatever of the contracting party, furnish few law suits, either in assumpsit or in any other form of action. Where there are such contracts in which the defaulting party is absolutely without fault, the relief offered by courts of law is

seldom considered necessary. It is very probable that should any of the counsel in this case undertake to set up a stock brokerage business, there would be much less business done upon the capital involved, less risks taken for impecunious customers in speculative stocks, no private wires between Chicago and the seaboard and no personal speculations in stocks in which customers were speculating, or, to put it in words that more truthfully express the situation, no personal wagers on the market on the other side of that upon which the bets of the customers had been registered. But such an admission as that involves no admission of the correctness of the plaintiff's position. Against it, we assert that the relation which the defendants sustained towards the plaintiff was not that of pledgees and that the law imposed upon them no duties and obligations except those duties and obligations which by contract they have undertaken. Of course in one sense the law imposes upon every man the duty of observing his contracts; but the remedy for the violation of that duty is in assumpsit and not in tort. Irrespective of all else, therefore, in the case, we insist that the first five counts of the declaration, *upon which alone the court below rendered judgment,* must fail, for they involve this unwarranted assumption on the part of the plaintiff, that the defendants were "pledgees" or "trustees" of certain property, the legal or equitable title to which was in him, for which property, because it was not given to him (although by his own testimony it would appear that he never demanded it, nor tendered what he himself claims was due upon it to the defendants) he can maintain what is to all intents and purposes an action in trover. This we specifically deny.

But if, in the present state of the pleadings, the question of the form of the action is not involved, as we believe it to be, the question of whether there was in the transactions,

as shown by plaintiff's own evidence, out of which this indebtedness grew, positive and actual fraud involving moral turpitude, certainly is. Upon both of these questions, therefore, it is necessary to discuss the facts and the legal inferences which appear from them.

Undoubtedly the plaintiff below, as we indicated in our "Statement," will, in this court, as he did in the court below, endeavor to make this the very simple case of the entrusting to the defendants of certain personal property by him, which personal property they feloniously and surreptitiously disposed of without any account to him. From the arguments which he and his counsel have heretofore made in the case, one at the very least would suppose it to be such a case as that of *Parson* v. *Martin*, 11 Gray (77 Mass.), 111, where a certain specific certificate of stock had been placed by the plaintiff in the hands of the defendant and that certificate converted. In truth and in fact the case is a very different one, and it seems advisable with reference to the whole discussion of the legal points and of the facts involved in this case, to consider briefly the true character of the stock-brokerage business as it was carried on by the defendants and joined in by the plaintiff. Chicago, as this court will take judicial cognizance, is not a great financial center, nor does the stock-brokerage business, so-called, or Stock Exchange, flourish there to any great extent; but the similarity of the methods employed to those in use upon the purely speculative side of the Produce Exchange makes to the local bar and to the courts the procedure fairly familiar. The evidence in this case shows that Crawford & Valentine were continually "trading" in very large amounts for various customers, and for themselves, by private wire upon the Stock Exchanges of New York and of Philadelphia, and that they were "trading" over the same wire for their cor-

respondent brokerage firms in New York and Philadelphia in immense sums upon what are termed Chicago securities, and even upon the Produce Exchange. All this business was done exclusively by the eastern brokers in the name and for the account of Crawford & Valentine, no disclosure of any principals being made by Crawford & Valentine nor any differences being made or signified to the eastern brokers between orders which were the result of instructions given Crawford & Valentine by so-called clients or customers, and those speculative deals, of which there appear to have been many, carried under what is called the "stocks and bonds" account or "house account" of Crawford & Valentine themselves.

Stock brokerage is really carried on in New York and Philadelphia, hardly so in Chicago at all; the Chicago end of the business, so far as eastern stocks are concerned, bearing about the same relation to the eastern Stock Exchanges as the bucket-shops scattered through the west in various country towns do to the Chicago Board of Trade. So far as the eastern end and more particularly the Philadelphia end of these transactions of Crawford & Valentine was concerned, it appears that even there, no particular stock was in the hands of the brokers in Philadelphia particularly applicable to the trades of Crawford & Valentine, or marked as belonging to them or was capable of identification as held for their account. The testimony of Mr. Drayton and Mr. Dick upon cross examination is clear and specific upon these points. Thus Mr. Drayton says that the fact was that Toland Bros. always held themselves ready to deliver upon the payment of the money which they had upon their books charged to Crawford & Valentine the amount of the stock which they had credited to the account of Crawford & Valentine, but that there was no particular stock which was marked

to Crawford & Valentine. (Abst., 99, 100.) He also testified that they have a clearing house for stock transactions in connection with the Philadelphia Stock Exchange and that whenever the amount of any given stock purchased upon any one day from the brokers upon the Philadelphia Stock Exchange equaled the amount that they had sold, then by virtue of this clearing house arrangement, no stock might pass. (Abst., 99, 100.) This arrangement is the same all over the world, Mr. Drayton says, and we suppose this is true. What these Philadelphia brokers did for Crawford & Valentine generally was not to buy and hold any specific shares of stock and carry them as pledges or bankers or collateral lenders or anything of that sort. All that theory is purely legal fiction, which we will hereafter briefly discuss in the light of the New York decisions upon which the plaintiff entirely relies. What the Philadelphia brokers did do for Crawford & Valentine was to enter into a contract with them to transfer to them certain stock upon the payment of a certain amount of money, being the market price upon the day the order was given, together with commissions and interest, it being, however, the clear understanding and idea of the parties that the stock would never be called for by Crawford & Valentine, but that at some subsequent time a settlement would be made in accordance with the market of the latter date. This was just as much the understanding in the case of purchase made by Crawford & Valentine as it was when they "sold short" in Philadelphia, which they frequently did, arriving at a settlement by "buying in" through the same broker, a condition of things in which it is apparent that there could be no particular stock which ever became the property of Crawford & Valentine. As Judge Woodruff in his dissenting opinion in *Markham* v. *Jourdain*, before cited, says of a similar transaction:

> "The transaction is an executory agreement for a pure speculation in the rise and fall of stock, which the broker, on condition of perfect indemnity against loss, agrees to carry through in his own name and on his own means of credit, accounting to his customer for the profits, if any, and holding him responsible for the losses."

Or, as that great intellectual giant of the law, Chief Justice Shaw of Massachusetts, says:

> "The contract is strictly conditional to deliver so many shares on payment of so much money; the money was never paid and the title to have performance never accrued."

Or as Judge Lowell, in the United States District Court for Massachusetts, has said very recently:

> "There is no obligation resting on the broker to buy the shares in the first instance, or even to refrain from disposing of them during the existence of the contract, so long as he delivers them when the customer tenders the money and demands the performance."

As a part of these transactions, whatever they were, Crawford & Valentine agreed, as the testimony showed, not only to pay interest upon the market value of the stock at the time it was bought, and commission, but also, in order to protect the Philadelphia people from any possible loss, to keep on deposit 10 per cent or so of the par value of the stock, so that, except in cases of unusual and unexpected fluctuations in value, the brokers in Philadelphia would be protected against loss and be positively sure of securing the compensation for which they took the risk.

It does not even appear that these Philadelphia brokers always, when making these contracts with Crawford & Valentine or other western correspondents, themselves bought

or sold the stock in question, although undoubtedly it is the usual custom of the trade to do so. Thus it appears affirmatively from Mr. Dick's testimony, emphatically repeated in the face of Mr. Burke's attempting to make him retract it (Abst., 148, and see page 142), that in certain contingencies the Philadelphia brokers, would make no trade at all, but make only a book entry. Thus, if he received an order to buy and sell the same stock for the same broker, Mr. Dick says, he would do what in Stock Exchange relations is called "cross the order." "I would go upon the "Stock Exchange and record the transaction. I would then "return to my office and report to the broker, 'I have bought "and sold for your account 100 shares of ..... stock "at ..... price.' I would place the purchase on one "side of my purchase and sales book, and the sale on the "other side. I would charge his account with the purchase, "plus the commission, and credit his account with the sale, "less the commission. In that case no stock would come to "him or be delivered by me." (Abst., 148.)

Again:

> "Q. Did I understand you to say that you do not always buy or sell as the case may be, upon the order of the broker? A. It depends upon the nature of my instructions.
>
> "Q. Where you have two orders, one to buy and one to sell? A. Suppose I have an order to buy 100 Metropolitan at 107 and it is selling at 108. I do not always execute the order. It depends upon the nature of my instructions. If I had an order to buy stock at best I would then execute it as instantaneously as I could. If, before I executed that order, I received an order to sell 100 at best, I would trade that myself naturally. There is the whole thing." (Abst., 149.)

Thus far we have been considering merely the transaction between Crawford & Valentine and the Philadelphia brokers,

and even with relation to them, we do not believe that the courts should or would say that the Philadelphia brokers were "pledgees" of stock which Crawford & Valentine had "entrusted" to them, so that an action of trover or conversion would lie in favor of Crawford & Valentine upon the unauthorized sale by the Philadelphia brokers of such stock.

In one sense the question of what the liability of the Philadelphia brokers might be to Crawford & Valentine for an unauthorized sale is a purely academic one in view of the considerations which affect the relations between the plaintiff below and the defendants; but if the court should hold that the relations of the Philadelphia brokers to Crawford & Valentine were not trust relations, that Dick Bros. and Toland Bros. & Co. were not "pledgees" of Crawford & Valentine's stock, there is an end to the case. For, *a fortiori,* if such a relation did not exist between Crawford & Valentine and the Philadelphia brokers as would entitle the former in similar circumstances to maintain this action against the latter, or as would prevent indebtedness arising from such transaction from the Philadelphia brokers to Crawford & Valentine being subject to a discharge in bankruptcy, then no such relation could exist in favor of the plaintiff below as against Crawford & Valentine.

The theory which would give under similar circumstances to Crawford & Valentine as against the Philadelphia brokers such an action as the plaintiff claims has accrued to him against Crawford & Valentine, and the theory upon which alone the plaintiff predicates fraud in the transactions under consideration, rests absolutely upon a line of New York cases which give countenance to a purely legal fiction, which the majority of the court adopted in *Markham* v. *Jourdain,* 41 N. Y., 39. It is needless to discuss any of the other cases

than that of *Markham* v. *Jourdain*, for upon the doctrine of pledge between the customer and the stockbroker, as enunciated by Judge Hunt in that case, all subsequent cases involving the question turned. But the opinion of the majority of the court in *Markham* v. *Jourdain* also held to the theory of a measure of damages, and to a proposition concerning the admission of evidence of the customs and usages of the Stock Exchange since entirely discredited and overruled, even in New York. (See, *Baker* v. *Drake*, 53 New York, 211; *Baker* v. *Drake*, 66 New York, 518.) It is to be noted that in the points in which it is discredited and overruled the opinions of the dissenting judges in *Markham* v. *Jourdain* are not more strenuous than upon the main point. We hold firmly to the belief that in the opinion of Judges Grover and Woodruff, dissenting from the opinion of the court in *Markham* v. *Jourdain*, will be found by this court the true principles of law, which would govern this case, were the defendants themselves the persons expected to buy and carry the stock. Dissenting opinions in the New York Court of Appeals are just as binding upon an Illinois court as the opinion of the majority of the same court, and no more so. Opinions from foreign courts are not, in the true sense of the word, "authority" upon an Illinois court, or upon this court. They owe their force to the strength with which they appeal to the reason and conscience of the judge, and we are content to apply this test in the question whether the opinion of Judge Hunt or the opinions of Judges Grover and Woodruff should be adopted. If the latter opinions are adopted, that, independently of all other considerations, would make an end to this case.

The opinion of the majority of the court in *Markham* v. *Jourdain* has been followed elsewhere. Explicitly, for ex-

ample, it has been followed by the Supreme Court of that mining camp, known as the State of Nevada.

Boylan v. *Huguet,* 8 Nevada, 345.

But it has been rejected by such judges as Allen and Rapallo in New York itself, notwithstanding the authority which it necessarily had in that state. (See dissent in *Baker* v. *Drake,* 66 N. Y., 518.) It is entirely denied by the Supreme Court of Massachusetts by Chief Justice Shaw in *Wood* v. *Hayes,* 15 Gray, 375, where he says of such an arrangement between the broker and the client that it stands "entirely upon the footing of the contract." And in *Coville* v. *Loud,* 135 Mass., 41, the doctrine is explicitly and in terms and with force repudiated. In *Weston* v. *Jordan,* 168 Mass., 501, the Supreme Court of Massachusetts again declares that:

> "When a broker buys shares at a margin and carries them for a customer, it has been held in some states that the relation between the customer and the broker is that of pledgor and pledgee. This view has not been accepted in Massachusetts."

Judge Lowell in the United States District Court of Massachusetts in *re Swift,* 105 Fed. Rep., 493, rendered an opinion in bankruptcy, in which, reviewing the cases, he delivered an opinion, the syllabus of which is as follows:

> "Under the law of Massachusetts as established by the decision, a broker who has purchased stock on a margin for a customer is not a pledgee thereof to secure his advances, but his contract is conditional, to deliver so many shares of the stock on payment of the remainder of the purchase price, and he may pledge the stock for his own debt, or even sell it without being guilty of conversion or of a breach of the contract until a demand has been made by the customer and refused."

In his opinion he says:

> "To hold that a broker is pledgee of stock bought by him on a margin would revolutionize the theory and practice of stockbrokers in Massachusetts."

(*Note.*—Notwithstanding the intimations of the plaintiff that *Markham* v. *Jourdain* governs the law in Illinois, we assert that "the theory and practice of stockbrokers" in Illinois is equally at variance with the legal fiction on which that case rests.)

> "If a stockbroker is the pledgee of this stock, then in the absence of authority from the pledgor, he can not rightfully transfer the stock to another by way of sale or by way of collateral security for an amount greater than that due him. * * * Yet, it is a matter of common knowledge that honest brokers in Massasetts pledge stock bought and carried by them on a margin for their customers as a security for their own debts, regardless of the amount of the customer's debt to them. To hold that in doing so they convert the stock. * * * is a conclusion to be avoided if possible. Again, the persons to whom the stock is pledged by the broker are understood to hold it until the broker's debt to them is discharged, irrespective of the state of accounts between the broker and the customer. This is true, though the pledgee knows that the stock was bought on a margin."

And again:

> "It was urged in the argument before me that the opinion in *Weston* v. *Jourdain* requires the broker always to have on hand shares enough to meet the customer's order, but this is not the true interpretation of the opinion. * * * Indeed, the Massachusetts doctrine plainly implies the contrary. Can it be said that the broker has on hand or under his control, stock which is pledged to a third party for a sum greater

than the debt of the customer to him? I think not. Yet both cases and daily practice support the broker's right to repledge in this way, and custom, at least, supports the right of the broker's pledgee to hold the stock against the customer. * * * There is no obligation resting on the broker to buy shares in the first instance, or even to refrain from disposing of them during the existence of the contract, so long as he delivers them when the customer tenders the money and demands performance."

Judge Lowell then takes up the apparent recognition of obligation upon the broker by the custom of brokers "to do something" before the stock is finally demanded. But he says that the courts of Massachusetts have treated this obligation as "compatible, not only with the broker's right to pledge the stock for his general debts, but, also, with the right of absolute sale"; and he argues that this vague impression of obligation on the part of brokers can not avail against logic and common sense, which under the relations by law existing between them, do not require the broker to retain any "shadowy right" in the stock any more than they prevent him from pledging it for his own debts.

Markham v. *Jourdain* is already discredited in Illinois. It has been said by the Supreme Court of this state in *Corbett* v. *Underwood*, 83 Ill., 324, that *Markham* v. *Jourdain* can not govern a case where, instead of the property being actually delivered into the actual possession of the defendant, it never came into his possession, which, as will be more fully dwelt upon hereafter, is certainly the case at bar, and the Supreme Court of Illinois declares that the usages and customs of the exchange upon which the contracts are to be executed are competent in evidence; this being a decision in the teeth of the opinion in the majority of the court in *Markham* v. *Jourdain*.

We doubt, indeed, whether an action of trover or conversion can lie for shares of stock in an incorporated company as belonging to the plaintiff in any case, where, as in this case, no particular certificate of stock in the hands of the broker could have been identified as the customer's property. This is independent of all questions concerning the defendants holding such stock, or the ownership of any such stock. Even if he had the ownership of the stock, if there were no particular certificates which identified it, it is not the proper subject of an action of trover. *Howell v. Lancaster*, 17 Sargent & Rawle, well expresses the rule. The court says:

> "Though trover might lie for a certificate of stock, as it does for a bond or debt, yet it will not lie for 100 shares of the stock, any more than it would for a debt due or for a right of entry."

It is, however, when we turn from the relations of Crawford & Valentine with their Philadelphia correspondents altogether, and look at the real state of affairs and the nature of such business at this end (in Chicago) as the plaintiff was engaged in with the defendants, that we can see most clearly the absolute *grotesqueness* of the proposition which Mr. Burke asserts in his pleadings and assumes in his arguments, *i. e.*, that he had "entrusted" to the defendants as "pledgees" stock which they "converted." At the very best, as we have pointed out, the doctrine as between any customer and any broker is a legal fiction, which it required a labored and sophistical argument of sophistical judges to incorporate into the jurisprudence of New York. But no such doctrine ever existed as between a customer and an intermediate "forwarder" or "middleman." As we have heretofore shown, the Supreme Court of Illinois have ex-

pressly said in *Corbett* v. *Underwood* that the doctrine of *Markham* v. *Jourdain* could certainly not govern cases where, instead of the property being actually delivered into the actual possession of the defendant it never came into his possession. Did Crawford & Valentine ever receive any of this Metropolitan Traction stock? Did it ever come into their possession? Did they ever intend or expect that it would, any more than did the Sugar stock and the Reading stock, and the People's Traction stock and the Gas stock which Burke had been "speculating" in through them? The court can have no doubt that had Mr. Burke at any time come into the office of Crawford & Valentine with the actual value of 550 shares of Metropolitan Traction stock in his hands and asked for the certificates the whole office force would have been stricken with paralysis of the power of speech. It is absurd. The plaintiff below did not instruct or order the defendants Crawford & Valentine to "purchase" stock for him or "to receive" stock for him or "to take over" stock for him. (For he tries to make a distinction which does not in reality exist between the *"taking up" of the contracts* of Valentine & McAvoy and Jamieson & Co. and the *"purchase" of stock.*) As we said in our "Statement," the very utmost that can be claimed by him is that he instructed the defendants to instruct Philadelphia brokers to "purchase" or "receive" or "take over" stock to be paid for by said Philadelphia brokers, until he should again instruct said defendants to order said Philadelphia brokers to resell the same. It might be claimed, also, that the contract included according to the customs and usages of the stock exchanges in Chicago and Philadelphia (of which Mr. Burke was perfectly cognizant) a guaranty on the part of the defendants to the plaintiff, that so far as he was concerned they would protect the contract so made by the Philadelphia

brokers. But there certainly was never any "trusteeship" on the part of the defendants thus created, nor did there come, nor was there expected to come, nor could there ever have come under the arrangement, any property whatever into the hands of the defendants belonging to the plaintiff and for which an action of conversion could lie.

But even the claim of the plaintiff below thus modified could not be sustained. Let us look at the situation a little closer, remembering all the time that John E. Burke was no ignoramus or innocent in these transactions. The evidence conclusively shows that he had been for years "playing" the stock exchange, or "speculating" if he prefers that term, without any intention of receiving or delivering any actual stock. Had he been seeking legitimate "investments," speculative or otherwise, in stocks, it is evident that he would have dealt directly with the real stockbrokers in New York or Philadelphia who handled these stocks, and not "traded" through the intermediary of what, as far as those stocks were concerned, could be nothing more or less than a bucket-shop. He was risking continually through these different stock-jobbing establishments in Chicago his money in purchases and sales upon margins of stocks in which he had no possible interest except as a speculator, which could only be bought or sold in a distant state through foreign brokers by wire, and to pay for which would be at all times evidently beyond his possible resources. For the purpose of making gains upon the fluctuations of such stock he was an habitué and haunter of these brokers' offices, as the evidence shows, every day eagerly inspecting the "tape and ticker." And what did this knowledge which he thus obtained of the usages and customs of the business inform him of? Plainly that when he, or any other customers of Crawford & Valentine, ordered, in their parlance, Craw-

ford & Valentine "to buy or sell stock," no share or certificate of which was hardly ever seen in Chicago, Crawford & Valentine would do nothing of the sort. Whatever language such order was couched in, Mr. Burke knew this perfectly well. He knew, indeed, that by telegraphic communication Crawford & Valentine might instruct somebody in New York or Philadelphia to buy that stock for the account of Crawford & Valentine; but even that was not the essential feature of Mr. Burke's contract with Crawford & Valentine, nor in our opinion one which he regarded as of importance. He deemed Crawford & Valentine to be solvent and ready and willing if he complied with his obligations in the game, to fulfil theirs. He was to keep 10 per cent of the par value of the stock in their hands to guarantee his end of the contract; and they undertook if the fluctuation of the stock was in his favor, at any time that he demanded it, to promptly pay him his winnings. If they insured themselves in this sort of a transaction by buying or selling in Philadelphia, well and good, and it may, indeed, be presumed that from his knowledge of the ordinary course of the business, Mr. Burke thought and believed that they would and did do so. But he could not have especially relied upon the idea that there was any security beyond the solvency of Crawford & Valentine and their willingness to respond to their contracts, arising from these Philadelphia transactions; for his knowledge of the course of the business would have shown him that no such security *could* exist. Thus, suppose after Mr. Burke's contract with Crawford & Valentine in consequence of which Crawford & Valentine undertook to "carry" 500 shares of Metropolitan Traction stock for him, and had contracted with Dick Bros. & Co. that such an amount should be "carried" for them, Mr. Pullman or some other customer of Crawford & Valen-

tine gave orders to Crawford & Valentine to "sell" for his account 500 shares of Metropolitan Traction. Mr. Burke is not of those who, like the innocent in the play, suppose that brokers can not sell what they have not bought. Mr. Burke knew perfectly well that any one out of hundreds, it may be, of Crawford & Valentine's customers might desire to sell Metropolitan Traction short. He knew that in the ordinary course of business in such a case Crawford & Valentine would order their correspondents, Dick Bros. & Co., to sell for *their* account 500 shares of Metropolitan Traction. What does Mr. Burke suppose would have been the result of this transaction, which no person could claim was irregular or out of the ordinary course of business upon his so-called "holdings?" The result in Philadelphia is shown in such a case by what did happen when Crawford & Valentine, first for Joseph R. Wilkins, and then on their own acount, went, as they called it, "short" in this Metropolitan stock. Dick Bros. & Co., having bought the stock and *credited* it to Crawford & Valentine's account because of the order given by Crawford & Valentine when Burke instructed them, and having sold the same amount of the same stock upon the order of Crawford & Valentine and debited their account with it, when Pullman or such other customer had given Crawford & Valentine instructions, would have had no Metropolitan Traction stock for Crawford & Valentine. But both Burke and Pullman would have had contracts with Crawford & Valentine, and those only. We say that Mr. Burke, the testimony shows, knew perfectly well the character of the business and the usages and customs of the trade which would have brought about this result, and could not have relied upon the trading which Crawford & Valentine did through their correspondents in Philadelphia and which did not amount to giving him any

security whatever in his dealings with these brokers. The stock-brokerage business must be dangerous and hazardous enough even in the great financial centers where it is most legitimately carried on, and where actual certificates of stock to the amount of millions upon millions of dollars pass from hand to hand every day. How much more so in the case of persons like the defendants, who, a thousand miles away from the seat of operations, are dealing for their customers here, necessarily through entirely independent and third parties, "carrying" for such customers upon "margins" the stocks dealt in, only by getting somebody else a thousand miles away to "carry" the same stock for them, on a similar margin?

The truth about this alleged conversion is that, without deeming it irregular and without anticipating, of course, the crash which came, Crawford & Valentine, after having ordered stock bought for their account in Philadelphia because of the transaction between Burke and themselves, first, upon the order of Wilkins, sold short 100 shares of Metropolitan Traction, and then bought it in, and afterwards deemed it would be a profitable speculation to trade upon the short side of the market in the same stock through the same brokers. It was not in their mind Mr. Burke's stock that they were selling, for in their mind Mr. Burke had no stock; he had simply a contract with them which they held themselves ready to perform, to settle such difference as should exist in his favor between the market price at the time that he ordered the stock bought and the time that he ordered it sold. They were doing on their own account, however, what they would have been obliged to do, and what it would have been perfectly regular for them to have done for another customer.

We can not, indeed, see how if there had never been a

single sale of Metropolitan Traction stock made for Crawford & Valentine in Philadelphia Mr. Burke would have had, upon their failure, any advantage over his present situation. Consider: Crawford & Valentine were dealing with Dick Bros. & Co. very extensively in all sorts and kinds of securities; a running account was kept between the two firms. Suppose that at the time of the failure Metropolitan Traction did stand to the credit of Crawford & Valentine with a considerable profit in it over the amount at which it had been bought. Suppose that upon the other side of Dick Bros. & Co.'s account with Crawford & Valentine there had been deals in Gas and Reading and Sugar and a score of other stocks, and that the losses upon those stocks were much greater than the profit upon the Metropolitan Traction leaving Crawford & Valentine upon the whole account very much in debt at the time of their failure to Dick Bros. & Co.; does Mr. Burke imagine that he could ever have received the benefit of the profit in the Metropolitan Traction stock by tendering to Dick Bros. & Co. the amount which they had expended upon that stock alone, with interest and commissions, no note being taken of the other and unprofitable deals of Crawford & Valentine with Dick Bros. & Co. standing upon the same account? If he does, he reckons without his host; for Dick Bros. & Co. did not have disclosed to them the persons upon whose account Crawford & Valentine were trading, and they knew in the transactions and were bound to know from first to last only Crawford & Valentine. This was the custom and rule of the business, and this custom and rule of the business Mr. Burke knew. If it be true that it was entirely dependent upon the state of the account between Crawford & Valentine and Dick Bros. & Co., how much the latter could demand before giving up any Metropolitan Traction stock that they might have

had, does it not follow that there is a legal impossibility in treating the Metropolitan Traction stock in the hands of Dick Bros. & Co. as the property of Burke and allowing him to recover upon such a theory.

Another incident in the dealings between the defendants we desire to call attention to, as throwing light upon the intention of Mr. Burke as to ever receiving this stock. When he took Mr. Kent to Crawford & Valentine, Mr. Kent, in his presence, so the evidence is, said that he would put up what would be sufficient to make a ten point margin on the Metropolitan Traction stock, but that was the last margin that he would ever put up for Mr. Burke (Abst., 196); that when that was gone he was through and the stock account could be wiped out and that if he put it up he wanted it understood that he would receive that amount back again whenever there was a ten point margin still left. Does that look like helping Mr. Burke in a legitimate investment speculative or otherwise in Metropolitan Traction stock, or does it look like helping Mr. Burke to "buy or sell on margins shares of stock without intending actually to receive the same if purchased or to deliver the same if sold?" (The quotation is from the Bucket-Shop Act of the State of Illinois.)

As we have before remarked, we can see nothing in the pretended distinction which the defendant in error makes between the transactions which actually occurred and that what they would have been had Crawford & Valentine been instructed originally that Burke wanted them to order "bought" five hundred Metropolitan Traction, instead of being instructed that he wanted them to "take over a deal" of Valentine & McAvoy's with him, and had been instructed to purchase three hundred Metropolitan Traction in January instead of being instructed to "take over" a precisely

similar deal in which Jamieson & Co. had been so instructed; for the evidence clearly shows that from the actual facts and from the necessary course of business, the stock which Valentine & McAvoy had ordered Dick Bros. & Co. to buy, and which Jamieson & Co. had ordered Huhn & Glendenning to buy, never passed into the ownership or possession of the plaintiff, and never was any more his property for which he could maintain such an action as this, than it would have been had Crawford & Valentine ordered it bought in the first instance.

Independently of the consideration of the invalidity of the contracts, we have already sufficiently discussed and insisted upon the proposition that as they were purely contractual relations and not those of trusteeship or bailment, the counts of this declaration for conversion, on which the judgment was rendered, can not be maintained. It seems to us inconceivable that under the evidence adduced here, it can be held that to a single share of Metropolitan Traction stock, which ever was held or alleged to have been held by Dick Bros. & Co. or by Toland Bros. & Co. in Philadelphia, Mr. Burke had either the right of property or the right of possession. If he had not, he must fail in his action for conversion.

As to the counts for deceit (the last five in plaintiff's declaration) they could not, in our view of the case, be material in any event, but the court below has implicitly said that we are not liable upon them. The judgment was given upon the other five. We refer to our "Statement," pages 36 and 37, of this brief and argument for our view concerning the materiality and the good faith of these representations.

V.

The irresistible inference from the testimony is to the effect that all the stock transactions in which the parties were from first to last engaged were of a gambling and illegal character.

1. During the entire space of time covered by these transactions the defendant in error never had possession of, nor did he ever see, any of the stock in which he pretended to be dealing and which stood to his apparent credit on the books of the plaintiffs in error, nor did he have control over any of such stock.

2. The same is true of his transactions through Valentine & McAvoy, the predecessors of Crawford & Valentine.

3. While the apparent volume of his transactions in stocks of various kinds through Crawford & Valentine and their predecessors amounted to hundreds of thousands of dollars, Mr. Burke never paid a dollar on the purchase price of his pretended investments. Except as they became so incidentally, his payments to margin his deals were not payments on the price of the stock, but to indemnify his brokers against a falling market.

4. There was no talk or understanding between the parties to the effect that Burke would ever pay for and actually receive the stock in question, nor was there any expectation on the part of anyone that he would.

5. Nor was there any expectation on the part of Crawford & Valentine that they would ever be called upon to deliver to Mr. Burke any of the stock which he was pretending to deal in.

6. On the contrary, it was the understanding, all around, tacit, if not expressed, that the sole object of all these transactions was the margin or market difference, and the markets were carefully watched from day to day to that end.

In other words, defendant in error was speculating in market differences, and not in stock.

7. During the entire time of Burke's transactions with both firms he never demanded the stock in question, nor any other stock which he pretended to own through his dealings with either of these firms, until after the failure of the plaintiffs in error, when he first conceived the idea of making a demand, and instituting this form of action.

8. No demand was ever made on Burke to pay his indebtedness for the stock in question, or any other stock dealt in by him.

9. Burke was never in a condition, at any time during the course of the transactions, to pay the plaintiffs in error even a small fraction of his pretended indebtedness to them.

10. When the last margin of $3,800 was put up, Burke was unable to advance more than $500. At that time he owed an apparent indebtedness to Crawford & Valentine of about $60,000.

11. Neither Crawford & Valentine nor their predecessor firm had at any time in their possession, or under their absolute control, any of the stock dealt in by the defendant in error.

12. All pretended purchases of stock were made by the plaintiffs in error through eastern brokers in their own name. Burke was unknown in the purchase by the eastern brokers, and the stock in their hands was always to the credit of Crawford & Valentine and was thus held as collateral to a pretended indebtedness of Crawford & Valentine to such eastern brokers.

13. Had the stock, or any of it, declined in the market below the margin paid, it would have been sold out at once by the eastern brokers, and the account debited or credited

with the gain or loss, as the case might be, and similar entries made in the accounts between the parties to this action.

> "All contracts for the purchase or sale of property with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the contract and market prices, are mere wager or gambling contracts and void."
>
> *Schneider* v. *Turner,* 130 Ill., 39.

See, also,

Cothran v. *Ellis,* 125 Ill., 506.
Lyon v. *Culbertson,* 83 Ill., 38.
Goby v. *People,* 31 Ill. App., 242.

Such a contract is void at common law and the statutes of Illinois making void "option" contracts and sales for "future delivery" leaves the common law in force.

Schneider v. *Turner,* 130 Ill., 39.
Cothran v. *Ellis,* 125 Ill., 506.
Lyon v. *Culbertson,* 83 Ill., 38.
Soby v. *People,* 31 Ill. App., 242.
Jamieson v. *Wallace,* 167 Ill., 396.

Viewing this matter as a whole, it is impossible to avoid the conclusion that this whole transaction is contrary to the policy of the law of the State of Illinois, and that from it no action (not even assumpsit) can arise in favor of the defendant in error. If an action in assumpsit for the breach of the contract which was entered into between the plaintiffs in error and defendant in error can not be sustained, neither can this action in tort. This proposition we suppose hardly requires authority, but incidentally we will say that

the case of *Coville* v. *Loud,* 135 Mass., 41, which we have heretofore cited as denying the "pledgor and pledgee" doctrine as between customers and brokers, was an action of tort. The circumstances were much more favorable to sustaining the action than in the case at bar, but the court, upon the ground that it was purely a matter of contract, said the case could not be sustained, and in conclusion remarked:

> "We have not deemed it necessary to consider whether a contract like this of buying stocks on a margin is to be deemed so contrary to the policy of the law that neither party can maintain any action against the other for breach of it."

Such a statement, however, would show that in the opinion of the Supreme Court of Massachusetts, transactions which would not support an action of assumpsit upon a contract between the client and the broker, will not sustain an action in tort like the present. Such is undoubtedly the law.

The Supreme Court of Massachusetts was speaking of the common law, and the question which they considered it unnecessary to consider, was whether a contract for "buying stocks on a margin" was to be deemed contrary to the policy of the common law. But the policy of the law in Illinois is very pronounced in relation to such transactions, as we respectfully submit. The test in such a case as the present is not what the form of the alleged contract be, but whether there is an intention and expectation upon the part of the persons engaged in the business that the property originally bought upon margin is ever to be actually delivered to the original customer or principal, or whether the deal is, so far as he is concerned, to be settled on "differences." If the latter is the fact, it does not matter what the form of the contract between the brokers and the vendor may be, nor whether

or not the brokers may be compelled under the rules of the exchange in which he may be trading himself, to receive the property. See *Tenney* v. *Foote*, 4 Bradwell, 594, where the opinion of Judge McAllister in the Circuit Court is adopted and given, the said opinion being afterwards endorsed by the Supreme Court in *Tenney* v. *Foote*, 95 Ill., 34.

See, also, *Schneider* v. *Turner*, 130 Ill., 28, where Judge McAllister traces the origin of the gambling transactions in "futures" upon the Board of Trade to similar gambling transactions upon Stock Exchanges. See, also, *Pope* v. *Hauke*, 155 Ill., 617, and many others. It is not the element of future delivery which has made the courts hold these various grain transactions upon the Board of Trade void as gaming contracts, but the fact that as between client and broker there was never any intention or expectation upon the part of the former to receive or deliver grain. Now, we think that the evidence in this case abundantly sustains the proposition that Burke never had the intention of taking this stock, or of offering to the brokers either here or in Philadelphia the value of it. It was purely a case of buying and selling stocks upon so-called margins. We submit further that the so-called "bucket-shop act" passed upon the 9th of June, 1887, and entitled "An Act to Suppress Bucket-Shops and Gambling in Stocks, Bonds, Petroleum, Cotton, Grain, Provisions or other Produce," while it does not change the common law so far as the validity of these gambling contracts is concerned, definitely expresses the policy of the State of Illinois regarding them and that it is plainly to be seen in that act that the buying or selling stocks upon so-called margins is the evil aimed at. To that act as it is found upon page 1304 of the last edition of Starr & Curtis' Statutes, and especially also to the case of *Saltz* v. *The People*, decided in the Third District by Judge Conger,

81 Ill. App., 162, we call the attention of the court. Soby was indicted for keeping in Jacksonville just such a place with regard to grain and provisions dealt in upon the Chicago Board of Trade, as the defendants kept in Chicago with regard to stocks dealt in in New York and Philadelphia. He kept an office and showed the quotations of the various markets, particularly of Chicago, on these commodities. He took orders from customers for these commodities and sent them to Lindblom & Co., his correspondents in Chicago, who executed them, as he swore, upon the Board of Trade. His customers put up a margin with him and he put up a margin with Lindblom. He never asked the intention of his customers, but his customers have had grain delivered to them. His customers, or one of them, swore that he did not buy the grain for actual use, but to make money out of it. The court says:

"An analysis of the first section will show that there are three different ways in which the same offense is described: First, keeping any place wherein is conducted or permitted the pretended buying or selling of grain, etc., either on margins or otherwise without any intention of receiving and paying for the property so bought or of delivering it sold; second, keeping a place wherein is conducted or permitted the pretended buying or selling of such property on margins; and third, where the party buying any of such property or offering to buy the same, does not intend actually to receive the same if purchased or to deliver the same if sold. The pretended buying or selling of margins is a term in popular use and its meaning well understood, and would doubtless have been sufficient description of what was intended to be prohibited, except for the ease with which it could be evaded; hence, the legislature have also given the first and third descriptions, so that while those engaged in the transaction may give it such a name as they choose, if it can be

seen the real intent of the parties was merely to speculate upon the rise or fall of prices and no actual delivery was contemplated, but the parties expected to settle upon the differences in the market, then it would be a gambling contract."

The case of *Jamieson* v. *Wallace,* 167 Ill., 396, is especially applicable to the case at bar, as the facts in the two cases are much the same. In that case the dealings of the parties were held to be gambling transactions and void.

In reply defendant in error may say that this question is not an issue here. Judged by the pleadings, that may be so. It is not, however, a question of pleading that confronts the court, but a question of public policy. Transactions of this character are not declared illegal and void to advantage either party to an action, but to satisfy the demands of public policy. Whenever it appears to the court, no matter how, that the transaction involved in a litigation is immoral, illegal and void, the proceedings will be dismissed and the parties will be left where the court finds them, regardless of the pleadings.

In *Oscanyan* v. *Winchester, etc., Co.,* 103 U. S., 261, the opening statements of plaintiff's attorney clearly showed that the transaction upon which the action was based was illegal and void. The court dismissed the action at once. The pleadings were silent on that issue. The Supreme Court sustained the lower court and said:

> "It would not be restrained by defects of pleading, nor indeed could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. * * * In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but for the law itself. * * * Whenever the illegality appears, whether the evidence arises from the one side or the other, the disclosure is fatal to the cause."

It is quite within the power of this court if it see fit to decline to uphold a claim founded on transactions that are contrary to public policy, or against public morality. We suggest this respectfully, in the full belief that the evidence upon which the judgment rendered below and based would warrant such drastic action, irrespective of time or place, or state of pleadings.

Respectfully submitted.

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